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In the Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ALIAKBAR FAZELIHOKMABAD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a decision by the Board of Immigration Appeals (BIA) denying an alien's motion to reopen deportation proceedings must be affirmed if it is plausible and not arbitrary.

2. Whether the BIA, in ruling on a motion to reopen deportation proceedings, is required to address specifically every point raised by the alien or to articulate every factor bearing on its decision.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes and regulations involved	2
Statement	3
Reasons for granting the petition	7
Conclusion	24
Appendix A	1a
Appendix B	8a
Appendix C	9a
Appendix D	16a
Appendix E	17a
Appendix F	18a
Appendix G	19a
Appendix H	20a
Appendix I	24a

TABLE OF AUTHORITIES

Cases:

Abudu v. *INS*, 802 F.2d 1096 ..... 15, 18
Achacoso-Sanchez v. *INS*, 779 F.2d 1260 ..... 8, 9, 16, 20
Ahwazi v. *INS*, 751 F.2d 1120 14
Balani v. *INS*, 669 F.2d 1157 ..... 8, 16
Barragan-Verduzco v. *INS*, 777 F.2d 424 17
Carrete-Michel v. *INS*, 749 F.2d 490 17
De La Luz v. *INS*, 713 F.2d 545 ..... 8, 13, 14
Figueroa-Rincon v. *INS*, 770 F.2d 766 ..... 8, 14
Gandjkarimi v. *INS*, No. 85-7511 (9th Cir. Sept. 15, 1986) 15
Gonzalez Batoon v. *INS*, 791 F.2d 681 14
Hamid v. *INS*, 648 F.2d 635 14
Hernandez-Cordero v. *INS*, 783 F.2d 1266, reh'g granted, 793 F.2d 701 16
INS v. *Bagamasbad*, 429 U.S. 24 9
INS v. *Chadha*, 462 U.S. 919 19

Cases—Continued: Page

INS v. *Hector*, No. 86-21 (Nov. 17, 1986) 9, 10, 19
INS v. *Jong Ha Wang*, 450 U.S. 139, rev'g 622 F.2d 1341 ..... 8, 9, 10, 11, 12, 16
INS v. *Phinpathya*, 464 U.S. 183 ..... 8, 10, 11, 12
INS v. *Rios-Pineda*, 471 U.S. 444 ..... 8, 9, 10, 12, 16, 20, 23
Israel v. *INS*, 710 F.2d 601, cert. denied, 465 U.S. 1068 .. 14
Jara-Navarette v. *INS*, 800 F.2d 1530 15
Leblanc v. *INS*, 715 F.2d 685 16
Luciano-Vincente v. *INS*, 786 F.2d 706 16
Luna v. *INS*, 709 F.2d 126 16
Mattis v. *INS*, 774 F.2d 965 ..... 8, 13, 14
Mejia-Carrillo v. *INS*, 656 F.2d 520 ..... 8, 13
Osuchukwu v. *INS*, 744 F.2d 1136 16
Prapavat v. *INS*, 662 F.2d 561 ..... 8, 13
Ramos v. *INS*, 695 F.2d 181 16
Ravancho v. *INS*, 658 F.2d 169 17
Reyes v. *INS*, 673 F.2d 1087 ..... 8, 13, 14
Saldana v. *INS*, 762 F.2d 824, amended, 785 F.2d 650, dissent from reh'g denied, 793 F.2d 222 ..... 14, 15
Sanchez v. *INS*, 755 F.2d 1158 16
Sang Seup Shin v. *INS*, 750 F.2d 122 ..... 10, 17
Santana-Figueroa v. *INS*, 644 F.2d 1354 ..... 8, 13
United States ex rel. Hintopoulos v. *Shaughnessy*, 353 U.S. 72 9
Vasquez v. *INS*, 767 F.2d 598 14
Villena v. *INS*, 622 F.2d 1352 11
Williams v. *INS*, 773 F.2d 8 ..... 8, 9, 16
Wong Wing Hang v. *INS*, 360 F.2d 715 ..... 8, 16
Zamora-Garcia v. *INS*, 737 F.2d 448 16
Zavala-Bonilla v. *INS*, 730 F.2d 562 13

Statutes and regulations:

Immigration and Nationality Act, 8 U.S.C. (& Supp. II) 1101 *et seq.* 10
8 U.S.C. 1105a(a)(3) 4
8 U.S.C. 1151 4
8 U.S.C. 1158(a) 18
8 U.S.C. 1182(a)(17) 23
8 U.S.C. 1251(a)(2) 3
8 U.S.C. 1253(h) 18

Statutes and regulations—Continued: Page

8 U.S.C. 1254(a) 19
8 U.S.C. 1254(a)(1) 2, 9, 11
8 U.S.C. 1255(a) 2, 4, 9, 19
8 U.S.C. 1427 18
8 U.S.C. 1427(a) 19
8 U.S.C. 1430 18
8 U.S.C. 1430(a) 19
Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639 (Nov. 10, 1986) 22
Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 (Nov. 6, 1986):
§ 201(a) 17
§ 245A 19
§ 245A(a) 17, 18
§ 245A(a)(4)(B) 17, 18
§ 245A(b) 17, 18
§ 245A(d)(2)(B)(ii)(III) 17, 18
§ 245A(h) 18
§ 302 18
§ 210 18

8 C.F.R.:
Section 3.2 ..... 2, 4, 10
Section 3.8(a) 3, 10
Section 243.5 23
22 C.F.R. 42.110 23

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IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ALIAKBAR FAZELIHOKMABAD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-7a) is reported at 794 F.2d 1470. The opinion of the Board of Immigration Appeals (App., *infra,* 9a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 8a) was entered on July 24, 1986. On October 9, 1986, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including November 21, 1986. On November 10, 1986, Justice O'Connor further extended the time for filing the petition to and including December 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

8 U.S.C. 1254(a)(1) provides in pertinent part:

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien * * * who applies to the Attorney General for suspension of deportation and—
>
> (1) is deportable under any law of the United States * * *; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence * * *.

8 U.S.C. 1255(a) provides:

> The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 C.F.R. 3.2 provides in pertinent part:

> Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not

available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted * * * unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. * * *

8 C.F.R. 3.8(a) provides in pertinent part:

Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. * * *

STATEMENT

1. Respondent, a native and citizen of Iran, entered the United States in January 1977 as a nonimmigrant student. Although he was authorized to stay in the United States until September 1978, he stayed beyond that date. Accordingly, in January 1980, the Immigration and Naturalization Service (INS) commenced deportation proceedings against him for remaining in the United States beyond the authorized time (see 8 U.S.C 1251(a)(2)). On May 22, 1980, the immigration judge (IJ) found respondent deportable and granted him 15 days to depart the United States voluntarily. Respondent appealed to the Board of Immigration Appeals (BIA), and on March 17, 1981, the BIA dismissed his appeal, but it again allowed respondent 15 days to depart voluntarily. App., *infra,* 1a-2a, 10a, 20a-22a, 24a-25a.[1]

[1] The BIA rejected respondent's argument that his violation of the immigration laws was *de minimis* because he had in fact filed a request for extension of stay but simply did so several months late. It ruled that the INS District Director has sole jurisdiction to review applications for extension of temporary stay. App., *infra,* 21a.

On April 17, 1981, respondent filed a petition for review in the Ninth Circuit. The court, however, never rendered a decision on the merits. Instead, on April 20, 1984, three years after the petition for review was filed, the court dismissed the petition for lack of prosecution because respondent had "fail[ed] to apprise [the] court of his whereabouts" and because his attorney likewise was "unable to ascertain [his] present whereabouts." App., *infra,* 2a, 10a, 19a.

On June 18, 1984, the INS ordered respondent to surrender for deportation on July 11, 1984. Respondent failed to appear for the scheduled deportation, despite his having received notice of the INS surrender order. Instead, two days prior to his surrender date, respondent married a United States citizen, Laurie Thomas. App., *infra,* 2a, 10a, 14a.

2. On October 4, 1984, Thomas filed an immediate relative visa petition on respondent's behalf (see 8 U.S.C. 1151).[2] That same month, respondent filed a motion to reopen deportation proceedings, pursuant to 8 C.F.R. 3.2, in order to seek adjustment of status (under 8 U.S.C. 1255(a)) and suspension of deportation (under 8 U.S.C. 1254(a)(1)). App., *infra,* 2a, 9a-10a.[3] In addition, respondent moved to reinstate his appeal in the Ninth Circuit. On October 5, 1984, the court granted respondent's motion and reinstated his petition for review (*id.* at 18a), thereby automatically staying his deportation pursuant to 8 U.S.C. 1105a(a)(3).

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[2] Respondent was arrested that same day when he and his wife went to the INS so he could apply for permanent residence (App., *infra,* 2a).

[3] Respondent filed the motion to reopen on October 4, 1984 (R. 14, 17) ("R." refers to the certified administrative record, a copy of which was lodged with the court of appeals). On October 26, 1984, after obtaining new counsel, respondent filed a supplemental motion to reopen (R. 14), which included various affidavits. According to

On February 8, 1985, the BIA denied respondent's motion to reopen (App., *infra,* 9a-15a). On the issue of adjustment of status, the BIA denied the motion to reopen on discretionary grounds. It noted (App., *infra,* 11a) that respondent had married only two days before he was required to leave the country and that both he and his wife knew at the time of the marriage that he was subject to a final deportation order. It also pointed out (*ibid.*) that respondent had not adequately explained his failure to surrender for deportation.

On the issue of suspension of deportation, the BIA found that respondent failed to make a prima facie showing of extreme hardship (App., *infra,* 12a-14a). The BIA

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respondent's own affidavit, respondent had lost touch with the attorney who had handled his deportation case in 1979, and he did not hear anything further until he received the order to surrender. He spoke with his attorney, who advised him that "there was nothing to be done." Thereafter, he spoke with his friends, who told him that if he and Thomas got married, he "wouldn't have to show up for the deportation." R. 37. The affidavit also stated that respondent would have difficulty returning to Iran because he would have to serve in the military, he would not fit into Iranian society, and he would not be able to finish his education (R. 39-41). It further stated that respondent's wife would have difficulty adjusting in Iran and "would be considered to be the enemy" (R. 41). Respondent acknowledged, however, that he was "not really afraid to go back to Iran" and that his family wanted him to return there (R. 39).

An affidavit by Thomas was also submitted with the supplemental motion to reopen (R. 42-44). Thomas acknowledged that because of the notice of deportation, she and respondent "got married—a little sooner than [they] expected" (R. 43). Thomas's affidavit recited her strong feelings for respondent (R. 44) but nowhere indicated whether she would be willing to go with him to Iran.

In addition to those affidavits, respondent also included, inter alia, affidavits by friends and acquaintances, letters by friends and an employer, letters and a court pleading by attorneys who had represented him on his original petition for review, documents concerning respondent's marriage, and reports and articles regarding social, political, and religious conditions in Iran (R. 45-101).

noted that the purported hardship to respondent's wife in moving to Iran was unsupported by any claim that she would in fact accompany him there (*id.* at 13a). It further pointed out (*ibid.*) that respondent's parents and siblings lived in Iran and could assist him in his relocation. In addition, it stated (*id.* at 14a) that the purported loss of economic and educational advantages in this country and the possibility that he could be ordered to serve in the military in Iran did not rise to the level of extreme hardship. Moreover, it indicated (*ibid.*) that respondent's claim that he would be discriminated against in Iran was merely conclusory and that his hardship claim was weakened by the fact that, as the husband of an American citizen, he could lawfully return to this country.

The BIA further ruled (App., *infra,* 14a-15a) that, wholly apart from respondent's failure to set forth a prima facie case for suspension of deportation, his motion to reopen should be denied as a matter of discretion. The BIA again indicated (*id.* at 14a)—as it had in its consideration of the adjustment of status issue—that respondent deliberately failed to surrender for deportation and was not diligent in prosecuting his appeal in the Ninth Circuit.

Respondent thereafter filed a petition for review in the court of appeals.[4] The court granted the petition and remanded the case to the BIA for further proceedings (App., *infra,* 1a-8a). At the outset of its analysis, the court summarized the Ninth Circuit's case law concerning the role of the BIA in ruling on a motion to reopen (App., *infra,* 4a-5a). Under this view, the BIA "must weigh both favorable and unfavorable factors" and "must state its reasons when weighing equities and denying relief" (App.,

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[4] In addition, respondent, having obtained the benefit of the automatic stay resulting from the reinstatement of the first petition for review, moved to dismiss that prior petition. The Ninth Circuit granted his motion on March 6, 1985. App., *infra,* 16a.

infra, 4a). In addition, the BIA "cannot act upon assumptions unsupported in the record and contradicted by affidavits that are not inherently unbelievable" (*id.* at 5a). Applying those principles, the court ruled (*ibid.*) that the BIA "acted arbitrarily and irrationally" in denying the motion to reopen. It stated (*ibid.*) that "[e]ach of the factors that the Board relied upon in denying the motion[] was based upon mere assumptions which were contradicted by [respondent's] evidence." The court found that the BIA erred in giving little weight to the respondent's marriage on the suspicion that it may have been contracted in order to avoid deportation. According to the court: "The Board simply ignored the wealth of evidence that the marriage was bona fide" (*id.* at 6a). As to the BIA's concern about respondent's lack of diligence in prosecuting his appeal, the court noted, with no explanation, that "[h]is affidavit indicates otherwise" (*ibid.*). The court further emphasized (*ibid.*) that the BIA had failed to discuss the evidence submitted by respondent on this issue.

With respect to respondent's failure to surrender for deportation, the court stated (App., *infra,* 6a) that the BIA erred in finding that respondent "had 'not adequately explained his failure' to surrender." The court ruled that respondent "had been told that the order would not be effective after his marriage, and * * * he therefore did not knowingly violate any order of the Service * * *" (*ibid.*). Finally, the court took issue with the BIA's statement that respondent could reenter the United States because of his marriage to a United States citizen. It noted that respondent, "once deported, could not obtain the visa because of conditions in Iran, including the lack of an American consulate" (*id.* at 7a).

REASONS FOR GRANTING THE PETITION

This case presents important and recurring issues of immigration law concerning the BIA's authority in ruling on motions to reopen deportation proceedings. This Court

has made clear in a series of cases that the Attorney General and his delegates possess broad discretion in ruling on such motions. See *INS* v. *Rios-Pineda,* 471 U.S. 444, 449-451 (1985); *INS* v. *Phinpathya,* 464 U.S. 183, 188 n.6 (1984); *INS* v. *Jong Ha Wang,* 450 U.S. 139, 143-144 n.5 (1981). The Ninth Circuit, however, has repeatedly disregarded those rulings by engaging in what amounts to *de novo* review of the BIA's discretionary denials of motions to reopen. The Ninth Circuit has done so in this case and in others[5] by (i) second-guessing the reasons given by the BIA and (ii) imposing a virtually insuperable requirement that the BIA explain every factor entering into its decision and discuss at length each point raised by the alien in the motion to reopen. Moreover, the Ninth Circuit's approach in reviewing the BIA's decisions conflicts with the more deferential approach of several other circuits that have addressed the issue. See, *e.g., Achacoso-Sanchez* v. *INS,* 779 F.2d 1260, 1265 (7th Cir. 1985); *Williams* v. *INS,* 773 F.2d 8, 9 (1st Cir. 1985); *Balani* v. *INS,* 669 F.2d 1157, 1161 (6th Cir. 1982); *Wong Wing Hang* v. *INS,* 360 F.2d 715, 719 (2d Cir. 1966).

Unless the court of appeals' course of decision is corrected, the immigration authorities will arguably be required to conduct evidentiary hearings in virtually every case in which an alien files a motion to reopen, even when the ultimate relief being sought is plainly unwarranted. Furthermore, as we show *infra,* the issues remain critically important notwithstanding the recent enactment of the Immigration Reform and Control Act of 1986 (the Reform Act), Pub. L. No. 99-603 (Nov. 6, 1986).

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[5] *E.g., Mattis* v. *INS,* 774 F.2d 965 (9th Cir. 1985); *Figueroa-Rincon* v. *INS,* 770 F.2d 766 (9th Cir. 1985); *De La Luz* v. *INS,* 713 F.2d 545 (9th Cir. 1983); *Reyes* v. *INS,* 673 F.2d 1087 (9th Cir. 1982); *Prapavat* v. *INS,* 662 F.2d 561 (9th Cir. 1981); *Mejia-Carrillo* v. *INS,* 656 F.2d 520 (1981); *Santana-Figueroa* v. *INS,* 644 F.2d 1354 (9th Cir. 1981).

1. Both the relief respondent seeks (suspension of deportation and adjustment of status) and the procedural device he is using to obtain that relief (a motion to reopen) are discretionary and are designed to address only the extraordinary situation. In rendering a decision in this context, the BIA is thus exercising what has been called "discretion piled on discretion." *Achacoso-Sanchez,* 779 F.2d at 1263.

To be eligible for suspension of deportation, an alien must have been physically present in the United States for a continuous period of seven years, must have been a person of good moral character during that time, and must satisfy the Attorney General that his deportation would cause "extreme hardship" to himself or to his spouse, parent or child who is a United States citizen or an alien lawfully admitted for permanent residence. 8 U.S.C. 1254(a)(1). Even if the alien meets those three requirements, the Attorney General may nonetheless deny relief as a matter of discretion. See 8 U.S.C. 1254(a)(1) ("Attorney General may, in his discretion, suspend deportation"); see also *INS* v. *Hector,* No. 86-21 (Nov. 17, 1986), slip op. 1-2; *Rios-Pineda,* 471 U.S. at 449-451; *Jong Ha Wang,* 450 U.S. at 144 n.5, 145; *INS* v. *Bagamasbad,* 429 U.S. 24, 26 (1976); *United States ex rel. Hintopoulos* v. *Shaughnessy,* 353 U.S. 72, 77 (1957).

The adjustment of status remedy is similarly discretionary. Under 8 U.S.C. 1255(a), the status of an alien may be adjusted by the Attorney General "in his discretion" if (i) the alien so applies, (ii) he is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (iii) an immigrant visa is immediately available to him when his application is filed. As with the suspension remedy, the Attorney General may deny relief even to aliens who satisfy the statutory requirements of eligibility. See, *e.g., Achacoso-Sanchez,* 779 F.2d at 1263; see generally *Williams* v. *INS,* 773 F.2d at 10.

Moreover, the procedure used by respondent for seeking that discretionary relief—a motion to reopen—is similarly discretionary. The Immigration and Nationality Act (the Act), 8 U.S.C. (& Supp. II) 1101 *et seq.*, does not provide a vehicle for reopening deportation proceedings after a final order of deportation has been entered. Moreover, Congress did not see fit to codify such a procedure in enacting the Reform Act.[6] That procedural device is purely a product of regulation (see 8 C.F.R. 3.2, 3.8(a)) to enable the BIA to reevaluate its prior disposition in cases where significant developments have occurred subsequent to the hearings and decision therein. See *Rios-Pineda,* 471 U.S. at 446; *Jong Ha Wang,* 450 U.S. at 140-141; see also *Sang Seup Shin* v. *INS,* 750 F.2d 122, 131 (D.C. Cir. 1984) (Starr, J., dissenting) ("The Board's discretion * * * is at its zenith in making a discretionary procedural determination which Congress did not see fit to enact."). Furthermore, the regulations are stated in the negative: "Motions to reopen * * * shall *not* be granted *unless* it appears *to the Board* that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing" (8 C.F.R. 3.2 (emphasis added)). Thus, the regulation "does not affirmatively require the Board to reopen the proceedings under any particular condition." *Jong Ha Wang,* 450 U.S. at 143-144 n.5.

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[6] In enacting the Reform Act, Congress comprehensively reviewed this Court's recent immigration decisions. In particular, it overruled the Court's holding in *Phinpathya* that any absence, however brief, breaks the continuity of physical presence for purposes of eligibility for suspension of deportation. See *Hector,* slip op. 6 n.7. Congress expressed no dissatisfaction, however, with this Court's decisions (discussed *infra*) underscoring the broad discretion of the BIA in ruling on motions to reopen.

2. This Court has repeatedly made clear that the BIA has wide latitude in ruling on motions to reopen. In *Jong Ha Wang,* a 1981 decision, this Court summarily reversed the Ninth Circuit in a case raising an issue similar to the present one. Like the present case, the alien in *Jong Ha Wang* filed a motion to reopen to apply for suspension of deportation on grounds of extreme hardship. The Ninth Circuit, sitting en banc, ruled that the extreme hardship statute should be liberally construed and that, under such a construction, the alien had made a prima facie case and was entitled to reopening. 622 F.2d 1341 (1980). This Court reversed, rejecting the Ninth Circuit's conclusion that reopening was required simply because the alien appeared to have established a prima facie case.[7]

Subsequently, in *Phinpathya,* the Court again discussed the BIA's broad discretion in ruling on motions to reopen to seek suspension of deportation. The issue in *Phinpathya* was whether the alien's three-month trip abroad had broken the continuity of her physical presence in this country, making her ineligible for suspension of deportation under 8 U.S.C. 1254(a)(1). The Court, in holding that it did, rejected the alien's claim that the case was moot

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[7] The Court quoted with approval the dissent in the Ninth Circuit in a companion case to *Jong Ha Wang,* which explained the need for permitting the Attorney General to be selective in deciding when to grant a motion to reopen:

> "If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case. It will also waste the time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations."

450 U.S. at 144 n.5 (quoting *Villena* v. *INS,* 622 F.2d 1352, 1362 (9th Cir. 1980) (en banc) (Wallace, J., dissenting).

because, upon her return to this country, she had been continuously present here for seven years. It noted that although the alien had filed a motion to reopen her deportation proceeding, "granting of the motion is entirely within BIA's discretion" (464 U.S. at 188 n.6).[8]

Recently, in *Rios-Pineda,* this Court reversed an Eighth Circuit decision ordering the BIA to reopen deportation proceedings to consider the hardship claims of two aliens who had filed frivolous appeals and violated the immigration laws. In holding that the BIA did not abuse its discretion in denying the aliens' motion to reopen, the Court explained (471 U.S. at 449) that "granting a motion to reopen is a discretionary matter with the BIA" and that such a motion may be denied as a matter of discretion even if a *prima facie* case of eligibility for relief has been made. Upon reviewing the record in the case, the Court found (*id.* at 451-452) that the case "[did] not involve the unreasoned or arbitrary exercise of discretion" and that "the BIA's explanation of its decision was grounded in legitimate concerns about the administration of the immigration laws." The Court further observed (*id.* at 452) that "it is not for the judiciary to usurp Congress' grant of authority to the Attorney General by applying what approximates *de novo* appellate review."

3.a. The Ninth Circuit has repeatedly failed to follow the teachings of this Court in *Jong Ha Wang, Phinpathya,* and *Rios-Pineda.* Only two months after this Court's *Jong Ha Wang* decision, the Ninth Circuit reversed the BIA's ruling that the alien had not shown extreme hardship on the ground that the BIA's written decision did not reflect explicit consideration of the alien's claim that if deported, he would suffer extreme hardship because he attended church here, had close friends in this country, and had

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[8] Although the Reform Act overruled the holding in *Phinpathya* on another issue (see note 6, *supra*), the Court's observations about motions to reopen remain fully authoritative.

become a part of American society. *Santana-Figueroa* v. *INS,* 644 F.2d 1354, 1357 (9th Cir. 1981). The court refused to assume that the BIA considered the alien's various allegations, noting that the BIA "must give reasons for its decisions showing that it has properly considered the circumstances." Four months later, in *Mejia-Carrillo* v. *INS,* 656 F.2d 520 (9th Cir. 1981), the Ninth Circuit reversed because the BIA, in denying the alien's application for suspension of deportation, failed to "give reasons which show that it [had] properly considered the facts which bear on its decision" (*id.* at 522). In *Prapavat* v. *INS,* 662 F.2d 561 (9th Cir. 1981), the court again reversed the BIA, noting that "[t]he Board's disposition of th[e] case [did] not exhibit a proper consideration of the relevant factors" (*id.* at 563) and that "laconic statements do not discharge the Board's duty" (*id.* at 562). Although *Santana-Figueroa, Mejia-Carrillo,* and *Prapavat* involved direct appeals to the BIA from adverse decisions by immigration judges, the Ninth Circuit soon made clear that it would apply substantially identical standards in the context of motions to reopen. Thus, in *Reyes* v. *INS,* 673 F.2d 1087 (9th Cir. 1982), the court ruled that the BIA erred in denying the alien's motion to reopen, stating (*id.* at 1089) that the BIA abuses its discretion whenever it "distorts or disregards important aspects of the alien's claim * * *." Likewise, in *Mattis* v. *INS,* 774 F.2d 965, 967-968 (9th Cir. 1985), in which the alien sought reopening to apply for adjustment of status based on an eleventh-hour marriage, the court reversed the BIA's denial of the alien's motion. The court held that "[c]ursory, summary or conclusory statements are inadequate" and that the BIA must "show proper consideration of all factors when weighing equities and denying relief." See also *De La Luz* v. *INS,* 713 F.2d 545 (9th Cir. 1983) (BIA reversed because it failed to weigh both favorable and unfavorable factors); *Zavala-Bonilla* v. *INS,* 730 F.2d 562, 568 (9th Cir. 1984) (BIA reversed for

"fail[ing] to delineate its reasoning adequately"); *Figueroa-Rincon* v. *INS*, 770 F.2d 766, 767-768 (9th Cir. 1985) (remanding case to BIA for a second time, noting that "the BIA must articulate specific, detailed reasons demonstrating that it fully considered [the alien's] individualized circumstances relevant to extreme hardship"); *Gonzalez Batoon* v. *INS*, 791 F.2d 681, 686 (9th Cir. 1986) (en banc) (BIA abused its discretion because it "misapplied the principles upon which it purported to act and failed to state valid reasons for its action").[9] In the present case, the panel explicitly relied, *inter alia*, on *Mattis*, *De La Luz*, *Reyes*, and *Gonzalez Batoon* in discussing the standard of review in the context of a motion to reopen (App., *infra*, 6a-7a).

b. Several Ninth Circuit judges have recognized that that court has improperly engaged in *de novo* review of the BIA's rulings. Thus, in a recent dissent from the denial of rehearing en banc in *Saldana* v. *INS*, 762 F.2d 824 (1985), amended, 785 F.2d 650 (9th Cir. 1986), Judge Sneed, writing for himself and six other judges, criticized the standards of judicial review that have been adopted by various Ninth Circuit panels in immigration cases (793 F.2d 222 (1986)). Judge Sneed observed (*id.* at 224) that the court has "passed beyond insisting on a sensible number of tracks that will establish that true discretion was exercised" and instead has "entered upon the task of providing the narrow pathway down which an agency must walk." He pointed out (*ibid.*) that "[d]iscretion so confined ceases to be true discretion." Instead, "[t]he agency in which discretion once was vested by this means becomes the puppet of the court" (*ibid.*). After discussing a number of specific Ninth Circuit immigration cases,

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[9] But see, *e.g.*, *Vasquez* v. *INS*, 767 F.2d 598 (9th Cir. 1985) (giving proper deference to the immigration authorities); *Ahwazi* v. *INS*, 751 F.2d 1120 (9th Cir. 1985) (same); *Israel* v. *INS*, 710 F.2d 601 (9th Cir. 1983), cert. denied, 465 U.S. 1068 (1984); *Hamid* v. *INS*, 648 F.2d 635 (9th Cir. 1981) (same).

Judge Sneed concluded (*id.* at 225) that the Ninth Circuit has "approach[ed] de novo review" and that its decisions have been contrary to the immigration statutes and Supreme Court precedents.[10]

4. The Ninth Circuit's approach in reviewing decisions by the BIA on motions to reopen conflicts with the decisions of several other circuits that have considered the matter. Whereas the Ninth Circuit has adopted a strict "articulation" test and has essentially reviewed the BIA's decisions *de novo,* the First, Second, Sixth, and Seventh Circuits have adopted a standard of affirming the BIA's denial of a motion to reopen "unless it 'was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis

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[10] In *Saldana,* the panel, in a split decision, ruled that the BIA abused its discretion in denying the alien's motion to reopen to apply for suspension of deportation (762 F.2d 824, amended, 785 F.2d 650). The INS had hoped that Judge Sneed's strong dissent from the denial of rehearing en banc, joined by six other judges, would result in decisions more consonant with this Court's opinions requiring deference to the discretionary determinations of the BIA. Unfortunately, the present case was decided less than a month after Judge Sneed's dissent. Moreover, the Ninth Circuit has continued to adopt new procedural devices for undercutting the BIA's discretion. For example, in *Abudu* v. *INS,* 802 F.2d 1096 (1986), the court ruled that the BIA erred in denying the alien's motion to reopen to apply for asylum and withholding of deportation. The court justified its result by holding that motions to reopen are analytically very similar to motions for summary judgment and that all reasonable inferences must be drawn in the alien's favor. The government intends to file a petition for a writ of certiorari in *Abudu,* suggesting that the Court hold the case for appropriate disposition in light of its disposition in the present case. See also *Jara-Navarette* v. *INS,* 800 F.2d 1530 (9th Cir. 1986) (reversing the BIA for a second time on the ground that the BIA gave only "cursory treatment" to the alien's claims of hardship); *Gandjkarimi* v. *INS,* No. 85-7511 (9th Cir. Sept. 15, 1986) (unpublished) (reversing the BIA for failing to consider hardship to alien's citizen spouse, even though BIA denied relief on discretionary grounds because the alien repeatedly violated the immigration laws).

such as invidious discrimination against a particular race or group.' " *Williams* v. *INS*, 773 F.2d 8, 9 (1st Cir. 1985), quoting *Leblanc* v. *INS*, 715 F.2d 685, 693 (1st Cir. 1983), and *Balani* v. *INS*, 669 F.2d 1157, 1161 (6th Cir. 1982). Accord, *e.g.*, *Achacoso-Sanchez*, 779 F.2d at 1265; *Wong Wing Hang*, 360 F.2d at 719; but cf. *Luna* v. *INS*, 709 F.2d 126, 128 (1st Cir. 1983). Under that standard, the BIA's reason "need not be compelling, or even convincing, to be sufficient" (*Achacoso-Sanchez*, 779 F.2d at 1266).[11] Similarly, various Fifth Circuit cases require—even in the context of direct review—only that the Board "consider the issues raised, and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted." *Luciano-Vincente* v. *INS*, 786 F.2d 706, 708-709 (5th Cir. 1986) (per curiam), quoting *Osuchukwu* v. *INS*, 744 F.2d 1136, 1142-1143 (5th Cir. 1984).[12] These tests are far less intrusive than the standards used by the Ninth Circuit[13] and are far more reflective of this Court's approach in *Jong Ha Wang* and *Rios-Pineda*.

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[11] As the court explained in *Achacoso-Sanchez*, there are no statutory or regulatory criteria for evaluating motions to reopen. Since there is "no law to apply," the courts cannot review the "merits" of the BIA's rulings. The BIA therefore abuses its discretion only "when it acts for a forbidden reason or for a reason that a court *can* determine is erroneous" (779 F.2d at 1264-1265 (emphasis in original)).

[12] Accord, *e.g.*, *Sanchez* v. *INS*, 755 F.2d 1158, 1160 (5th Cir. 1985) (test is whether *any* consideration was given to a limited range of factors). But see *Hernandez-Cordero* v. *INS*, 783 F.2d 1266, 1269, reh'g en banc granted, 793 F.2d 701 (5th Cir. 1986) (requiring the BIA to "meaningfully address[]" each relevant factor); *Zamora-Garcia* v. *INS*, 737 F.2d 488, 491 (5th Cir. 1984) (same); *Ramos* v. *INS*, 695 F.2d 181, 188 (5th Cir. 1983) (same).

[13] The District of Columbia Circuit and the Third Circuit arguably apply a standard that is more similar to that of the Ninth Circuit than

5. The recent enactment of the Reform Act does not render the issues in this case any less important. The Reform Act provides, *inter alia,* for the temporary (and ultimately permanent) adjustment of status of aliens who entered the United States before January 1, 1982, and who meet various other requirements. While the Reform Act makes available to certain aliens a potential new mechanism for legalizing their status, we expect that large numbers of motions to reopen will continue to be filed notwithstanding that new legislation.

a. Section 201(a) of the Reform Act adds a new Section 245A(a) to the Act. Under Section 245A, an alien is eligible for adjustment of status to lawful temporary resident if he entered the United States before January 1, 1982, and has resided here continuously since that date.[14] In addition, under Section 245A(b), if the alien has been a lawful temporary resident for at least 18 months but not more than 30 months, he may obtain lawful permanent resident status, provided that he demonstrates basic

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to that of the various other circuits discussed *supra.* See *Sang Seup Shin* v. *INS, supra* (BIA abused its discretion in failing to discuss the fact that alien's wife had become a United States citizen); *Ravancho* v. *INS,* 658 F.2d 169 (3d Cir. 1981) (BIA reversed for failing to discuss psychological report in conjunction with other evidence). Both *Sang Seup Shin* and *Ravancho* contained vigorous dissents. The Eighth Circuit's standard is somewhat difficult to discern. In *Barragan-Verduzco* v. *INS,* 777 F.2d 424 (8th Cir. 1985), the court stated that the BIA must consider "all the factors that the petitioners present as constituting extreme hardship" (*id.* at 425). Nonetheless, the court there affirmed what it characterized as a "cursory" decision of the BIA on the basis of the entire record (*id.* at 426). See also *Carrete-Michel* v. *INS,* 749 F. 2d 490 (8th Cir. 1984) (holding that the BIA failed to give adequate consideration to the alien's specific hardship claims).

[14] There are additional requirements as well. For example, an alien is ineligible for legalization if he has been convicted of a drug-related offense (Section 245A(d)(2)(B)(ii)(III)) or if he has been convicted in the United States of any felony or any three misdemeanors (Section 245A(a)(4)(B)).

citizenship skills and meets certain conditions similar to those for obtaining temporary resident status. Once the alien has obtained permanent resident status, he may achieve citizenship on the same basis as any other permanent resident (see generally 8 U.S.C. 1427).[15]

The legalization program embodied in Section 245A(a) and (b) is neither self-executing nor immediately effective. Section 245A(a)(1)(A) gives the Attorney General 180 days to establish the legalization program and to set in place the 12-month application period. Until such a date is set and arrives, no alien will be entitled to legalization under Section 245A(a) and (b).

Moreover, various forms of relief other than legalization may provide the alien with a quicker route to permanent residency (and ultimately citizenship).[16] Thus, aliens who qualify for legalization may still have strong reasons for continuing to pursue alternative remedies, and we expect that many of them will initiate, or continue to press, motions to reopen to seek suspension of deportation, adjustment of status, asylum (8 U.S.C. 1158(a)) or withholding of deportation (8 U.S.C. 1253(h)). Furthermore, there are aliens who entered the country prior to January 1, 1982, who, for one reason or another, will not qualify for legalization.[17] Finally, aliens who entered the

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[15] In addition, Section 302 of the Reform Act (amending Section 210 of the Act) contains provisions for adjustment of status for aliens who performed at least 90 man-days of seasonal agricultural services in the year that ended May 1, 1986.

[16] In addition, aliens granted legalization are ineligible for certain public welfare benefits for five years after the granting of temporary status (Section 245A(h)). That restriction does not apply to aliens obtaining permanent residence in some other way.

[17] As noted in note 10, *supra*, we will soon be filing a petition for a writ of certiorari in *Abudu* v. *INS*, 802 F.2d 1096 (9th Cir. 1986). The alien in *Abudu* entered the United States in 1973, but he appears ineligible for legalization because of his prior drug offenses. See Reform Act, Section 245A(a)(4)(B) and (d)(2)(B)(ii)(III).

country on or after January 1, 1982, are ineligible for legalization. They may, however, be eligible for adjustment of status, asylum, or withholding of deportation, and the Reform Act will in no way curtail the number of motions to reopen filed by such aliens. In short, we believe that the issues in this case will continue to arise with great frequency.[18]

6.a. On the merits, we submit that the court of appeals may not overturn the BIA's denial of a motion to reopen simply because it disagrees with the BIA's reasoning or because the BIA has not addressed every point raised by the alien or has not articulated every factor bearing on its decision. As this Court has made clear, the BIA must be

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[18] We note that the enactment of the Reform Act does not render this case moot. As indicated above, respondent's residence in this country began in January 1977. However, if he is to obtain legalization, he must file a timely application under the new legalization provisions and prove that he meets all of the criteria. Even if respondent files an application under Section 245A while this case is still pending, that will not moot the case if respondent continues to pursue his motion to reopen. If respondent were to prevail on his claim of entitlement to adjustment of status and suspension of deportation, he would thereby acquire the status of permanent resident under 8 U.S.C. 1254(a) and 1255(a). It is possible that he could obtain that relief sooner by pursuing his motion to reopen instead of simply applying for legalization. This would advance his eligibility date for achieving citizenship (see 8 U.S.C. 1430(a) (requiring permanent resident status for three years as a prerequisite to naturalization)). In addition, respondent might be eligible for public welfare benefits, and aliens granted legalization under Section 245A are not entitled to certain public assistance benefits for five years after obtaining temporary resident status (see note 16, *supra*). For these reasons, it may be advantageous to respondent to continue to pursue his motion to reopen even if he also chooses to seek legalization under Section 245A. As long as respondent continues to pursue his motion to reopen, we believe that there will remain a justiciable controversy between the parties. See generally *Hector*, slip op. 6 n.8; *INS* v. *Chadha*, 462 U.S. 919, 936-937 (1983).

affirmed if its decision was not "unreasoned or arbitrary." *Rios-Pineda,* 471 U.S. at 451. Thus, as various circuits have held (see pages 15-16, *supra*), the only function of the reviewing court is to ensure that the BIA's decision is rational, does not depart from established policies, and does not rest on an invidious or otherwise impermissible basis. Under such an approach, the BIA must simply give *some* reason for its decision; it need not consider every factor raised by the alien. And the court need not be convinced or persuaded by the reason given by the BIA; if the BIA's reasoning is plausible, its decision must be affirmed, even if the court would have reached a different result. See, *e.g., Achacoso-Sanchez,* 779 F.2d at 1265-1266.

b. When the proper standard of review is applied, it is clear that the BIA's decision in this case should be upheld. Respondent's hardship claims are anything but compelling; his request for adjustment of status was based on a marriage that was entered into only two days before he was due to be deported; and respondent had until that time disregarded the immigration laws and had not been diligent in prosecuting his appeal. In these circumstances, the BIA was well within its discretion in denying reopening.

In particular, the record reveals that respondent was ordered to surrender for deportation, and admitted having received notice of that order. He contacted his attorney, who told him that nothing could be done. He then contacted his friends, however, who told him to get married and ignore the surrender order. Based on that advice, and without consulting with the INS, respondent did not appear for his deportation. App., *infra,* 2a, 6a, 11a; R. 37-38. Respondent's willful failure to appear for deportation, in and of itself, is sufficient ground to justify the Board's refusal to reopen his case. See *Rios Pineda,* 471 U.S. at 451 (in exercising discretion, the Board may take into account the alien's disregard of immigration laws).

Moreover, the Ninth Circuit seriously erred in concluding (App., *infra,* 6a) that since "[respondent] had been told [by friends] that the order would not be effective after his marriage," he therefore "did not knowingly violate any order of the Service." We know of no other case holding that an alien must be held blameless for violating the immigration laws as long as he is acting on the erroneous advice of (non-lawyer) friends. The BIA in no way abused its discretion in taking into account respondent's failure to appear for deportation.

Although respondent's intentional failure to surrender would have been sufficient in and of itself to deny the motion to reopen as a matter of discretion, the BIA gave additional reasons that bolster its decision. For instance, the BIA cited respondent's "negligen[ce] in prosecuting his appeal." App., *infra,* 11a, 14a. With no analysis whatsoever, the Ninth Circuit disputed the BIA's reliance on this factor, stating simply that "[respondent's] affidavit indicates otherwise" (App., *infra,* 6a). The panel was apparently referring to respondent's contention that his attorney had lost touch with him. But respondent lived at five different addresses between 1982 and 1984 (R. 36-37), and there is nothing to suggest that he informed his lawyer of those changes in address. Similarly, nothing suggests that respondent made affirmative efforts to contact his lawyer or the court to learn the status of his case. Indeed, the last contact that respondent had with his attorney prior to receiving the order to surrender was in the fall of 1982 (R. 37). Thus, it was through respondent's own negligence or misconduct that his attorney did not know where to contact him.

The BIA gave yet another reason for denying the motion to reopen on discretionary grounds: respondent's marriage, upon which the adjustment of status request and his hardship claim were based, was entered into only two days before his scheduled deportation date. Respond-

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ent's wife admitted that the timing of the marriage was advanced solely to avoid respondent's deportation (R. 43). And as the BIA pointed out (App., *infra,* 11a), the hardship caused by deportation after such a marriage is necessarily diminished in severity by the fact that the couple entered into the marriage knowing full well that respondent was subject to a deportation order. The BIA is plainly entitled to assign less weight to a last-minute marriage that was timed for the very purpose of providing an alien an excuse not to surrender for deportation.[19]

The BIA was also correct in concluding that respondent had failed to make a prima facie showing that his deportation would subject either himself or his citizen wife to extreme hardship. As the BIA noted (App., *infra,* 13a), respondent's family ties were in Iran, since his parents and siblings lived there. His only relevant tie in this country was to his wife, whom respondent married two days before he was due to be deported. It was obviously proper for the BIA to give little weight to respondent's assertions that the educational and financial opportunities are better in this country and that he would have trouble adjusting in Iran. Similar claims are made repeatedly in suspension cases.

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[19] The panel errs in stating (App., *infra,* 6a) that the BIA "ignored" respondent's evidence that the marriage was bona fide. The BIA clearly examined such evidence (see App., *infra,* 12a). While respondent may have legitimate emotional attachments to his spouse, his own evidentiary materials reveal that the timing of the marriage was designed for the purpose of preventing deportation (R. 43). Indeed, the propriety of the BIA's reliance on the marriage's timing is confirmed by the fact that Congress recently enacted legislation to prevent aliens from obtaining lawful permanent residence by entering into a marriage solely for immigration purposes. See Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639 (Nov. 10, 1986).

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In the course of its opinion, the BIA indicated (App., *infra*, 13a-14a) that respondent's deportation could be temporary because his marriage gave him the lawful means to immigrate to the United States when a visa became available. The Ninth Circuit took issue with the BIA on this point, noting (*id.* at 6a-7a) that respondent, once deported, could not obtain the visa because of the lack of an American consulate in Iran. To be sure, there is no American consulate in Iran. Nonetheless, respondent could apply to a third country's consulate for a visa and obtain a United States visa upon arrival in that country. See generally 22 C.F.R. 42.110 (consular officer must take immigrant visa application from alien not residing in the consular's district if the alien is physically present therein). Alternatively, even though respondent is under an order of deportation to Iran, he may, in the discretion of the District Director, "self deport" at his own expense to a third country, and seek a visa to enter the United States. 8 C.F.R. 243.5.[20] Thus, the BIA was correct in observing that respondent's removal from this country would not necessarily be permanent.

3. The Ninth Circuit's decisions undermining the BIA's discretionary authority to deny motions to reopen have had—and will continue to have—a serious adverse effect on the administration of the immigration laws. Motions to reopen are frequently used to avoid deportation and prolong an alien's stay in this country. See generally *Rios-Pineda*, 471 U.S. at 451 (noting incentives of aliens to "drag out the deportation process"). The decision in the present case and others like it will encourage the filing of insubstantial motions to reopen since, even in cases with very weak facts, an alien can forestall deportation for a

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[20] We note that an alien who is deported faces a five-year statutory prohibition against re-entering the United States, but he may obtain a discretionary waiver from the Attorney General. See 8 U.S.C. 1182(a)(17).

considerable period of time. Indeed, the Ninth Circuit's numerous unwarranted reversals of the BIA have even now resulted in an increase in the BIA's already heavy workload. This case underscores the need for this Court to reaffirm the BIA's right to be selective in granting motions to reopen.

CONCLUSION

The petition for a writ of certiorari should be granted.[21]

Respectfully submitted.

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DECEMBER 1986

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[21] In light of its recent opinions addressing the subject at issue, the Court may wish to consider summary reversal.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS -
FOR THE NINTH CIRCUIT

No. 85-7107
INS NO. A24 220 587

ALIAKBAR FAZELIHOKMABAD, PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS ARGUED AND SUBMITTED MARCH 10, 1986 SAN FRANCISCO, CALIFORNIA

[Filed July 24, 1986]

OPINION

Before: DUNIWAY, SCHROEDER, and CANBY, Circuit Judges.

SCHROEDER, Circuit Judge.

Petitioner Aliakbar Fazelihokmabad petitions for review of the Board of Immigration Appeal (BIA)'s denial of his motions to reopen. In the motions he sought to apply for adjustment of status, pursuant to section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255, based on his recent marriage to a United States citizen, and also for suspension of deportation based on extreme hardship pursuant to section 244(a) of the Act, 8 U.S.C. § 1254(a).

Petitioner is a citizen of Iran who entered the United States on a student visa in January 1977. In 1979, he was tardy in filing a routine request for extension of time of

permitted stay. Therefore, his student status was not reinstated and he was ordered deported on May 22, 1980. He appealed to the BIA, which dismissed his appeal. Petitioner then sought review in this court on March 17, 1981. That appeal was dismissed for lack of prosecution, apparently due to his counsel's failure to contact him at the correct address.

In June, 1984, the Immigration Service contacted petitioner by mail and ordered petitioner to surrender for deportation on July 11, 1984.

Petitioner married Laurie Thoms [*sic*], an American citizen, on July 9, 1984. According to affidavits of petitioner's friends, the couple had been planning to marry for several months before the marriage took place. When petitioner and his wife went to the Immigration Service on October 4, 1984, to apply for permanent residence, the INS took petitioner into custody based on the deportation order for deportation July 11, 1984.

Petitioner's wife then filed an immediate relative visa petition based on her United States citizenship, and petitioner submitted motions to reopen the deportation proceedings in order to apply for the adjustment of status and for suspension of deportation.

In his motions to reopen, petitioner submitted evidence aimed at establishing three principal matters: first, that his marriage was bona fide; second, that responsibility for the lack of prosecution of his earlier appeal to this court lay with his former attorney and not with him; and finally, that he and his wife would endure extreme hardship if he were deported to Iran, because of the conditions in that country and because of his practical inability to obtain the visa to which his marriage would entitle him.

With respect to the marriage, the petitioner submitted his own affidavit and those of his wife, friends, and a neighbor, attesting to the strength and commitment of the marriage. He also submitted photographs, the marriage

announcement, his life insurance policy giving his wife's name as beneficiary, and a letter from his bank confirming the couple's joint account. In addition, other affidavits stated that the couple had lived together for several months before their marriage and had begun to plan their marriage before petitioner received the order to surrender to the INS.

On the matter of his 1981 appeal to this court which was dismissed for lack of prosecution, the petitioner submitted his detailed affidavit. It explained that when petitioner's original attorney in the appeal gave up his immigration practice, the case was assumed by another attorney. That attorney tried to communicate with petitioner by writing to the wrong address. The appeal was dismissed after that attorney advised this court that he could not locate the petitioner.

Petitioner's evidence on hardship covered several areas. It documented profound social changes in Iran that occurred since petitioner left as a teenager in 1977, and it explained the detrimental effect life there would have on him in view of his adoption of American social practices and his lack of familiarity with the fundamentalist Islamic religion now practiced in Iran. The evidence also showed the hardship that his wife, as an American, would suffer as a social outcast if she were to accompany him to Iran. Finally, the evidence showed that because there was no United States consulate in Iran to process an immigrant visa, and because petitioner would be subject to two years of mandatory Iranian military service, he would not be able to leave Iran for at least two years to find a consulate which could process his immigrant visa application. There is no dispute that as the spouse of an American, he would be legally entitled to reenter this country. *See* section 201 of the Immigration and Nationality Act, 8 U.S.C. § 1151. As a practical matter, however, if deported to Iran he would not be able to obtain the visa for at least two years.

The BIA denied petitioner's motions to reopen. Without discussing any of the affidavits, the Board concluded that the motion to reopen for adjustment of status based on the marriage should be denied in the exercise of its discretion, because the marriage was so recent and because petitioner had been negligent in prosecuting his appeal to this court in 1981.

In exercising its discretion to deny the motion to reopen to apply for suspension of deportation because of extreme hardship, the Board again relied on petitioner's negligence in prosecuting the earlier appeal. The Board also rejected the claim on the merits, concluding that petitioner faced no permanent prospect of hardship in view of his marriage to a United States citizen. The Board observed that petitioner possesses a "ready means to lawfully and permanently return to this country, if he so chooses, on account of his marriage to a United States citizen." The Board did not discuss the difficulties the petitioner would encounter in obtaining such a visa because of the lack of a consulate in Iran and because of Iranian conscription requirements.

We review the BIA's denial of petitioner's motions to reopen for abuse of discretion. *INS v. Rios-Pineda*, 105 S. Ct. 2098, 2102-03 (1985); *Vasquez v. INS*, 767 F.2d 598, 600 (9th Cir. 1985). The BIA's denial of a motion to reopen will be upheld unless it is arbitrary, irrational, or contrary to law. *Gonzalez-Batoon v. INS*, 791 F.2d 681, 684 (9th Cir. 1986); *Ahwazi v. INS*, 751 F.2d 1120, 1122 (9th Cir. 1985); *Ramon-Sepulveda v. INS*, 743 F.2d 1307, 1309 (9th Cir. 1984). In denying a motion to reopen, the BIA must weigh both favorable and unfavorable factors, *De La Luz v. INS*, 713 F.2d 545, 546 (9th Cir. 1983), and the BIA must state its reasons when weighing equities and denying relief. *See Prapavat v. INS*, 662 F.2d 561, 562 (9th Cir. 1981).

In a recent *en banc* opinion, we held that the Board exercised its discretion in an arbitrary and unreasoned fashion when it "misapplied the principles upon which it purported to act and failed to state valid reasons for its action. . . ." *Gonzalez-Batoon,* 791 F.2d at 686. In that case we reviewed the effect of the Supreme Court's decision in *Rios-Pineda* on our review of the Board's exercise of its discretion in denying petitions to reopen for discretionary relief. We decided that we must look to whether the Board's explanation of its decision was grounded in "legitimate concerns about the administration of the immigration laws . . . ." *Id.* (quoting *INS v. Rios-Pineda,* 105 S. Ct. at 2103); *see also Aviles-Torres v. INS,* 790 F.2d 1433, 1437 (9th Cir. 1986). In *Gonzalez-Batoon* we specifically held that the Board acted irrationally when it misstated the record and accused the petitioner of overstaying a grant of voluntary departure, when in fact she had not done so.

The BIA is not required to consider whether the threshold statutory eligibility requirements are met if it decides that relief should be denied as a matter of discretion, *INS v. Bagamasbad,* 429 U.S. 24 (1976); *Vasquez v. INS,* 767 F.2d 598, 600 (9th Cir. 1985). Yet when it weighs the equities presented in the petition, it cannot act upon assumptions unsupported in the record and contradicted by affidavits that are not inherently unbelievable. *See Mattis v. INS,* 774 F.2d 965 (9th Cir. 1985); *Aviles-Torres,* 790 F.2d at 1436.

In applying these principles to the case before us, we must conclude that the Board acted arbitrarily and irrationally in denying the petitions for reopening. Each of the factors that the Board relied upon in denying the motions was based upon mere assumptions which were contradicted by the petitioner's evidence.

The timing of the petitioner's marriage in relation to the deportation order clearly was a substantial factor in the

Board's decision to deny the petition for reopening for adjustment of status based upon that marriage. The Board gave the marriage little weight as an equitable factor "because of the suspicion that such a marriage may have been contracted in order to avoid deportation." The Board simply ignored the wealth of evidence that the marriage was bona fide. It gave no reasons for doing so, as we have indicated it should. *See Israel v. INS,* 785 F.2d 738, 742 & n.8 (9th Cir. 1986). The evidence was not refuted and was not inherently unbelievable.

We have held squarely that the Board's failure to consider such evidence is an abuse of discretion. *Mattis v. INS,* 774 F.2d at 968-69. *See also Aviles-Torres v. INS,* 790 F.2d 1433, 1436 (9th Cir. 1986); *De La Luz v. INS,* 713 F.2d at 546; *Reyes v. INS,* 673 F.2d 1087, 1090 (9th Cir. 1982). These cases establish that the Board must accept as true the facts stated in affidavits for reopening unless the affidavits are inherently unbelievable. Petitioner's affidavits are not.

Similarly, without discussing the evidence submitted to the contrary, the Board asserted that the petitioner was negligent in prosecuting his appeal to this court. His affidavit indicates otherwise.

In connection with the petitioner's failure to surrender to INS officials after his marriage, the BIA stated only that he had "not adequately explained his failure" to surrender. He stated in his affidavit, however, that he had been told that the order would not be effective after his marriage, and that he therefore did not knowingly violate any order of the Service. His subsequent conduct and that of his wife in seeking permanent resident status for him was fully consistent with his affidavits.

In dealing with the merits of the hardship claim, the Board recognized that the petitioner would endure hardship in Iran, but mistakenly discounted that hardship on the theory that the petitioner, upon deportation, easily

could reenter this country because of his marriage. The problem that the Board did not address, and that the government before us does not dispute, is that the petitioner, once deported, could not obtain the visa because of conditions in Iran, including the lack of an American consulate.

The Board's assumption with regard to lack of hardship, like assumptions underlying the other reasons given for denying reopening, is mistaken. It does not provide a rational basis for denying reopening. The Board thus "misapplied the principles upon which it purported to act and failed to state valid reasons for its action." *Gonzalez-Batoon,* 791 F.2d at 686. Therefore, "the denial of reopening in the exercise of discretion . . . cannot be sustained." *Id.*

The BIA's decision is reversed and the matter remanded.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. CA 85-7107 (A24 220 587)

ALIAKBAR FAZELIHOKMABAD, PETITIONER,

v.

IMMIGRATION & NATURALIZATION SERVICE, RESPONDENT.

JUDGMENT

Filed July 24, 1986

Upon Petition to Review an order of the Immigration and Naturalization Service.

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the order of the said Immigration and Naturalization Service in this Cause be, and hereby is REVERSED AND REMANDED.

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA 22041

File: A24 220 587 - San Francisco

In re: ALIAKBAR FAZELIHOKMABAD

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Terry J. Helbush, Esquire
Simmons and Ungar
517 Washington Street, Suite #301
San Francisco, California 94111

ON BEHALF OF SERVICE: Jane Leroe
General Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251 (a)(2)] – Nonimmigrant – remained longer than permitted

APPLICATION: Motion to reopen

[Feb. 8, 1985]

In a decision dated March 17, 1981, the Board dismissed the respondent's appeal from a decision of the immigration judge issued on May 22, 1980 finding him deportable as charged and granting him voluntary departure. The respondent has filed the present motions to reopen in order to apply for adjustment of status pursuant to section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255, based upon his marriage to a United States citizen

and to apply for suspension of deportation pursuant to section 244(a) of the Act, 8 U.S.C. § 1254(a). The motions will be denied.

The respondent is a 25-year-old native and citizen of Iran who entered the United States on January 26, 1977, as a student. He was found deportable at a deportation hearing on May 22, 1980, and this Board dismissed the respondent's appeal on March 17, 1981. On April 17, 1981, the respondent filed a petition for review of the Board's decision in the United States Court of Appeals for the Ninth Circuit. This petition for review was dismissed for lack of prosecution on April 20, 1984.[1] On June 18, 1984, the Service issued a notice ordering the respondent to surrender for deportation, which was to be effected on July 11, 1984. The respondent did not report to Service officials and, on July 9, 1984, he married a United States citizen. The respondent's wife filed an immediate relative visa petition on his behalf on October 4, 1984. The respondent simultaneously applied for adjustment of status and moved to reopen deportation proceedings based upon his marriage and pending adjustment application. *See* 8 C.F.R. § 242.22. On October 26, 1984, the respondent also moved to reopen deportation proceedings in order to apply for suspension of deportation.

In *Matter of Garcia,* 16 I&N Dec. 653 (BIA 1978), we held that motions to reopen involving adjustment of status applications filed simultaneously with a visa petition pursuant to 8 C.F.R. §245.2(a)(2) would ordinarily be granted by the Board even though the underlying visa petition had not yet been approved, unless clear ineligibility for adjustment is apparent in the record. However, *Matter of Garcia* also held that motions to reopen such as the one now

---

[1] Upon the respondent's motion, the United States Court of Appeals for the Ninth Circuit has apparently reinstated the petition for review on October 5, 1984.

before us may be denied if it is determined that the application for adjustment would be denied on discretionary grounds. *Matter of Garcia, id. See also Matter of Reyes,* 18 I&N Dec. 249 (BIA 1982); *Matter of Rodriguez-Vera,* 17 I&N Dec. 105 (BIA 1979). Furthermore, it is well-established that motions to reopen can be denied on discretionary grounds, regardless of statutory eligibility. *INS* v. *Bagamasbad,* 429 U.S. 24 (1976). *See also INS* v. *Wang,* 450 U.S. 139 (1981); *Agustin* v. *INS,* 700 F.2d 564 (9th Cir. 1983). Where the marriage which forms the basis for a motion to reopen occurs after a final administrative order of deportation has been entered and just prior to actual deportation, we accord less weight to the marriage for purposes of exercising discretion. *See generally Riasati* v. *INS,* 738 F.2d 1115 (10th Cir. 1984); *Pang Kiu Fung* v. *INS,* 663 F.2d 417 (2d Cir. 1981); *Obitz* v. *District Director,* 623 F.2d 1331 (9th Cir. 1980). This is so because of the suspicion that such a marriage may have been contracted in order to avoid deportation. Moreover, the hardship that deportation can cause to the citizen spouse is generally entitled to less consideration when the spouse chooses to marry an alien who is subject to a deportation order.

Based upon our review of the record in this case, we find that the respondent's motion to reopen to apply for adjustment of status must be denied because that relief is not warranted in the exercise of discretion. The respondent married barely 2 days before he was required to leave the country. He has not adequately explained his failure to surrender to Service officials for deportation. He also admits that both he and his wife were aware at the time of their marriage that he was then subject to a final order of deportation which was issued on account of his failure to appraise [*sic*] his attorneys of his whereabouts and to prosecute his appeal before the United States Court of Appeals for the Ninth Circuit. We are not unmindful of the hardships and dislocation which the respondent and his

spouse may experience if he returns to his native country pending the processing overseas of his immigrant visa. We conclude, however, that such difficulties do not outweigh the adverse factors in his case. *See Matter of Blas*, 15 I&N Dec. 626 (BIA 1974; A.G. 1976).

In support of his motion to reopen in order to apply for suspension of deportation, the respondent has submitted an application for that relief (Form I-256A), his affidavit and that of his wife and of various acquaintances in addition to documentary evidence concerning the economic, political and social conditions in Iran. This material reflects that the respondent's parents and siblings continue to reside in his native country. He maintains that it would be a hardship for him to return to Iran because he would be subject to military conscription in that country. He also contends that he would find it difficult to adjust to life in that country on account of the changes in Iranian society as a result of the revolution there and that he would be subject to discrimination and ostracism in Iran on account of his residence in the United States and his marriage to a United States citizen. He further asserts that he and his wife would suffer emotional hardship if she does not accompany him to Iran. If his wife should return to Iran with him, the respondent maintains that she will be unable to adapt to the repressive conditions in that society and that she may be in danger on account of her United States citizenship.

In order to establish eligibility for suspension of deportation, an alien must show that he has been physically present in the United States for the last seven years, that he has been a person of good moral character for the same period, and that his deportation will result in extreme hardship to himself or to his United States citizen or permanent resident spouse, children, or parents. Section 244(a)(1) of the Act. In seeking reopening in order to apply for that relief, it is incumbent upon the alien to make a

prima facie showing both that the statutory requirements for suspension of deportation have been satisfied and that a grant of such relief may be warranted as a matter of discretion. *See Matter of Reyes, supra; Matter of Lam,* 14 I&N Dec. 98 (BIA 1972). An alien requesting suspension of deportation must therefore allege and support by affidavits or other evidentiary material the particular facts which will be proved at the reopened hearing. 8 C.F.R. § 3.8; *INS* v. *Wang, supra.* Conclusory allegations unsupported by such material are not sufficient to satisfy this burden. *Id.*

Based upon our review of the record, we find that reopening of the proceedings in order to afford the respondent with an opportunity to apply for suspension of deportation is not warranted because a prima facie showing of extreme hardship has not been established. Although the respondent's wife may have difficulties in adjusting to Iranian society, it is not apparent that she will accompany her husband to his native country. The affidavit of the respondent's wife is noticeably lacking in any assertion that she will join her husband in Iran. Moreover, even if she did accompany him to that country, it is not evident that her stay in that country would be permanent because the respondent may return to this country upon his receipt of an immigrant visa. Any hardship which the respondent and his spouse may suffer if he returns to Iran while his wife remains in this country without him could also be temporary because the respondent has the means to immigrate lawfully to this country on account of his marriage to a United States citizen.

In his own case, the difficulties which the respondent faces in readjusting to life in his native country do not tend to rise to a level of hardship which can be considered extreme. *See Matter of Uy,* 11 I&N Dec. 159 (BIA 1965). He has many family members in that country including his parents and siblings who could assist him in his relocation.

He has submitted no evidence, only his conclusory assertions, that he will be subject to discriminatory treatment and ostracism on account of his ties to the United States and his lack of commitment to the ideals of the Iranian revolution. Such assertions are insufficient, without more, to warrant reopening. The fact that he may be subject to military conscription in Iran also does not tend to establish that his return to that country will result in extreme hardship to himself or to his citizen spouse. It is also well-established that economic deprivations and loss of educational opportunities which the respondent may experience upon return to Iran do not tend to rise to the level of extreme hardship without more. *See Matter of Anderson,* 16 I&N Dec. 596 (1978); *Matter of Chumpitazi,* 16 I&N Dec. 629 (1978). We also note that any hardships which the respondent faces upon return to Iran are further diminished by the fact that he possesses a ready means to lawfully and permanently return to this country, if he so chooses, on account of his marriage to a United States citizen.

Considering the evidence submitted concerning the collective hardships which the respondent and his citizen spouse together would face upon the respondent's return to Iran, we therefore find that a prima facie showing of extreme hardship has not been established. In addition, significant reasons exist for denying reopening in the exercise of discretion. As we previously stated, the respondent acknowledged that he was notified of the Service's intent to deport him on July 11, 1984, yet he purposefully failed to surrender. He also was negligent in prosecuting his appeal before the United States Court of Appeals. We therefore find that, because the respondent is not deserving of a grant of suspension of deportation in the exercise of discretion, reopening to permit an application for that

relief is not warranted in his case. *See Pang Kiu Fung* v. *INS, supra; Lam Chuen Ching* v. *INS,* 467 F.2d 644 (3d Cir. 1972); *Matter of Reves, supra.*

ORDER: The motions to reopen are denied.

/s/ MARY MAGUIRE DUNNE
Acting Chairman

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-7236

ALIAKBAR FASELIHOKMABAD, PETITIONER,

v.

IMMIGRATION & NATURALIZATION SERVICE, RESPONDENT.

ORDER

Filed March 6, 1985

Petitioner's motion for voluntary dismissal of this petition for review is granted.

A certified copy of this order sent to the agency shall act as and for the mandate of this court.

For the Court:

/s/ SUSAN M. JOHNSON
Susan M. Johnson
Deputy Clerk

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-7236

ALIAKBAR FASELIHOKMABAD, PETITIONER,

v.

IMMIGRATION & NATURALIZATION SERVICE, RESPONDENT.

ORDER

Filed December 27, 1984

Before: HUG and PREGERSON, Circuit Judges

Petitioner's motion for stay of these proceedings pending disposition by the Board of Immigration Appeals of petitioner's motion to reopen deportation proceedings is granted. These proceedings are stayed until the Board rules on petitioner's motion or until six months from the entry of this order, whichever occurs first. Upon expiration of the stay, petitioner shall promptly file a status report with this court.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-7236

ALIAKBAR FASELIHOKMABAD, PETITIONER,

vs.

U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT.

Filed Oct. 5, 1984

ORDER

Before: HUG and PREGERSON, Circuit Judges.

The court has considered petitioner's oral emergency motion to recall the mandate and to reinstate the petition. Petitioner's motion is granted.

Petitioner represented to this court that he is eligible to apply for collateral relief and that he will promptly file a motion to reopen with the BIA.

Within 21 days of the entry of this order, petitioner shall submit to this court a copy of the motion to reopen and seek a stay of the proceedings in this court, if appropriate.

Petitioner's new counsel, Dan Chavez, Esq., shall promptly file a notice of appearance in this court.

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-7236

ALIAKBAR FASELIHOKMABAD, PETITIONER,

vs.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT.

Filed Apr. 20, 1984

ORDER

Before: HUG, PREGERSON, and NORRIS, Circuit Judges.

In response to this court's order of January 30, 1984 petitioner's counsel informed the court that he was unable to ascertain the present whereabouts of petitioner. Petitioner's failure to apprise this court of his whereabouts amounts to lack of prosecution of this petition. Accordingly, this case is dismissed for lack of prosecution.

Petitioner's counsel shall serve a copy of this order upon petitioner at his last known address and file proof of such service with this court within 10 days of the entry of this order. Petitioner may move personally to reinstate this case within 30 days of the entry of this order. If a motion to reinstate is not filed, the mandate shall issue 35 days from the entry of this order.

APPENDIX H

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
WASHINGTON, D.C. 20530

File: A24 220 587 - San Francisco

In re: ALIAKBAR FASELIHOKMABAD

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Wayne Caldwell, Esquire
505 Sansome Street, Suite 1010
San Francisco, California 94111

ON BEHALF OF SERVICE: Beverley M. Phillips
Trial Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. § 1251 (a)(2)) – Nonimmigrant student – remained longer than permitted

APPLICATION: Voluntary departure

Mar. 17 1981

In a decision dated May 22, 1980, the immigration judge found the respondent deportable as charged and granted him 15 days in which to voluntarily depart from the United States. The appeal will be dismissed.

The respondent is a native and citizen of Iran, who entered the United States on January 26, 1977, as a nonimmigrant student authorized to remain until September 29,

1978 (Exh. 3 & 4). An Order to Show Cause (Form I-221) was issued on January 31, 1980, charging him with being deportable under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), as a nonimmigrant who had remained longer than permitted

At a deportation hearing on May 22, 1980, he denied deportability for having remained longer than authorized despite conceding that he was never granted an extension of nonimmigrant stay beyond September 29, 1978 (Tr.p. 1). He contends that he mistakenly omitted filing a Request for Extension of Stay (Form I-538) in 1978 and filed it later on February 1, 1979, which was never acted upon by the Service. He claims that violation to be *de minimis* and contends that the District Director should have reinstated his student status. On July 30, 1980, the District Director refused to reinstate the respondent's student status.

The respondent's claims with regard to his reinstatement application amount to a request to this Board for reinstatement, and an extension of his nonimmigrant status. Adjudications of applications for extension of temporary stay are matters solely within the jurisdiction of the District Director and are not reviewable by the immigration judge or this Board. 8 C.F.R. 214.1(c); *Matter of Sourbis,* 11 I&N Dec. 335 (BIA 1965). The propriety of a District Director's decision on an application for extension of stay cannot be considered in deportation proceedings. *Matter of Teberen*, 15 I & N Dec. 689 (BIA 1976); *see Matter of Sourbis, supra.*

A nonimmigrant alien has the obligation either to depart at the expiration of his authorized stay or to obtain a proper extension of that stay. 8 C.F.R. 214.1. An inquiry into whether or not an overstay was justified is not germane to the question of an alien's deportability as an overstay. *Matter of Teberen, supra; Matter of Arao,* 13 I&N Dec. 156 (BIA 1969). All the Service needs to establish for a charge under section 241(a)(2) of the Act is

that a respondent was admitted as a nonimmigrant for a temporary period; that the time has elapsed; and that the alien has failed to depart. *Milande* v. *INS*, 484 F.2d 774 (7 Cir. 1973); *Matter of Teberen, supra.*

Here, the respondent never obtained extension of his departure date from the District Director. Consequently, he is deportable by clear, convincing, and unequivocal evidence as required by *Woodby* v. *INS*, 385 U.S. 276 (1966), and 8 C.F.R. 242.14(a).

On appeal, the respondent also submits that the provision of 8 C.F.R. 244.1 which limits Iranians to a 15-day voluntary departure period violates the Equal Protection Clause of the United States Constitution.

Neither the Board nor the immigration judge may rule on the constitutionality of the statutes we administer or the regulations properly promulgated under the provisions of the Immigration Act. *See* section 103 of the Act, 8 U.S.C. 1103, and 8 C.F.R. 2.1; *Matter of Bogart,* 15 I&N Dec. 552 (BIA 1975, 1976; A.G. 1976); *Matter of Chery and Hasan*, 15 I&N Dec. 380 (BIA 1975); *Matter of Santana,* 13 I&N Dec. 362 (BIA 1969); *Matter of L-*, 4 I&N Dec. 556 (BIA 1951). Moreover, the respondent has now been able to remain in the United States for more than nine months since the immigration judge's decision, well beyond the 30-day period usually deemed a reasonable time in which to voluntarily depart. *See Matter of M-*, 4 I&N Dec. 626 (BIA 1952). The appeal will be dismissed.

The respondent's original voluntary departure grant of 15 days has expired. As stated in *Matter of Chouliaris,* 16 I&N Dec. 168 (BIA 1977), where an immigration judge has provided for voluntary departure of 30 days or less, the Board shall reinstate the original grant. Accordingly, we will grant the respondent 15 days from the date of this order in which to voluntarily depart from the United States.

ORDER: The appeal is dismissed.

FURTHER ORDER: The respondent is permitted to depart from the United States voluntarily within 15 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

/s/ DAVID L. MILHOLLAN
David L. Milhollan
Chairman

APPENDIX I

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGATION and NATURALIZATION SERVICE

File: A24 220 587 - San Francisco, California

In the Matter of ALIAKBAR FASELIHOKMABAD,
Respondent

IN DEPORTATION PROCEEDINGS

FOR THE RESPONDENT:
Wayne Caldwell, Esquire
505 Sansome Street, Suite 1010
San Francisco, California 94111

FOR THE SERVICE: Beverley M. Phillips, Esq.
Trial Attorney
San Francisco, California

CHARGE: I & N Act—Section 241(a)(2)—remained longer—student

APPLICATION: To be permitted to remain in the United States as a student

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May 22 1980

DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Iran who was admitted to the United States at New York, New York on or about January 26, 1977, as a student. He was thereafter authorized to remain until September 29, 1978. He remained thereafter.

The respondent contested deportability, contending that the District Director acted arbitrarily in failing to act on

his application for an extension of stay. I have no authority to review the actions of the District Director. The respondent's avenue of relief would be to appeal to the United States Courts for review of the District Director's actions. He has also raised other contentions, claiming estoppel and violation of the respondent's constitutional rights. I am unable to rule on these in the context in which they were presented. Accordingly, I find the respondent deportable as charged.

The respondent has requested, in the event he is found deportable, sufficient time within which to depart so that he can finish this semester at San Francisco State University which he is presently attending. Under the regulations, I am permitted to only grant a period of 15 days. He will be granted the privilege of voluntary departure but not for a longer period.

IT IS ORDERED that in lieu of an order of deportation the respondent be granted voluntary departure without expense to the Government on or before June 6, 1980, or any extension beyond such date as may be granted by the District Director and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: the respondent shall be deported from the United States to Iran on the charge contained in the Order to Show Cause.

/s/ CHESTER SIPKIN
Chester Sipkin
United States Immigration Judge

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Supreme Court, U.S.
FILED
FEB 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1008 (2)

In The
Supreme Court of the United States
October Term, 1986

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

ALIAKBAR FAZELIHOKMABAD,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a decision by the Board of Immigration Appeals (BIA) denying an alien's motion to reopen deportation proceedings must be affirmed it is plausible and not arbitrary without regard to factors or evidence not considered by the BIA.

2. Whether the BIA, in ruling on a motion to reopen deportation proceedings, is required to address specifically the points raised by the alien or to articulate all factors bearing on its decision.

TABLE OF CONTENTS

	Pages
Questions Presented	i
Statement	1
Summary of Argument, Reasons for Denying Certiorari	5
Argument	
I. THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE PROPER STANDARD OF REVIEW TO BE APPLIED IN REVIEWING DISCRETIONARY DETERMINATIONS BY THE BIA. NOR DOES THE STANDARD USED BY THE NINTH CIRCUIT IN THIS CASE CONFLICT WITH SUPREME COURT PRECEDENT.	6
II. THIS CASE IS NOT A PROPER VEHICLE TO RAISE THE ISSUES PRESENTED BECAUSE OF INTERVENING LEGISLATIVE DEVELOPMENTS.	13
III. THIS CASE IS NOT YET RIPE FOR REVIEW NOR IS IT A PROPER VEHICLE TO RAISE THE QUESTIONS PRESENTED BECAUSE OF THE FACTUAL DISPUTES LEFT UNRESOLVED.	17
Conclusion	18

TABLE OF AUTHORITIES

Pages

CASES:

Achacoso-Sanchez v. INS, 779 F.2d 1260 (7th Cir. 1985) 11

Ahwazi v. INS, 751 F.2d 1120 (9th Cir. 1981) 13

Aviles-Torres v. INS, 790 F.2d 1433 (9th Cir. 1986) 13

Balani v. INS, 669 F.2d 1157 (6th Cir. 1982) 7, 10

Brotherhood of Locomotive Fireman & Enginemen et al. v. Bangor & Aroostoor Reilroad Co., et al., 389 U.S. 327 (1967) 17

Citizens to Preserve Overton Park, Inc. et. al. v. Volpe, Secretary of Transportation, 401 U.S. 402 (1970) 7

Carrete-Michel v. INS, 749 F.2d 490 (8th Cir. 1984) 9

Dallo v. INS, 765 F.2d 581 (6th Cir.1986) 11

De La Luz v. INS, 713 F.2d 545 (9th Cir.1983) 8

Gonzalez-Batoon v. INS, 791 F.2d 681 (9th Cir. 1986) 8, 13

Haftlang v. INS, 790 F.2d 140 (D.C. Cir.1986) 9

Wong Wing Hang v. INS, 360 F.2d 715 (2nd Cir.1966) 7, 10, 11

INS v. Phinpathya, 464 U.S. 183 (1984) 7

INS v. Rios-Pineda, 471 U.S. 444 (1985) 6, 10, 12, 13

INS v. Jong Ha Wang, 450 U.S. 139 (1981) 12, 13

LeBlanc v. INS, 715 F.2d 685 (1st Cir.1983) 10

Luciano-Vincente v. INS, 786 F.2d 706 (5th Cir.1986) 10

TABLE OF AUTHORITIES—Continued

Pages

Luna v. INS, 709 F.2d 126 (1st Cir.1983) 10

Mattis v. INS, 774 F.2d 965 (9th Cir.1985) 8

Motamedi v. INS, 713 F.2d 575 (10th Cir.1983) 9

NLRB v. Guernsey-Muskingum Electric Co-op Inc., 285 F.2d 8 (6th Cir.1960) 17

Osuchukwu v. INS, 744 F.2d 1136 (5th Cir.1984) ... 10

Prapavat v. INS, 662 F.2d 561 (9th Cir.1981) 8, 9

Ramos v. INS, 695 F.2d 181 (5th Cir.1983) 10

Ravancho v. INS, 658 F.2d 169 (3rd Cir.1981) 9

Reyes v. INS, 673 F.2d 1087 (9th Cir.1982) 8, 9

Sang Seup Shin v. INS, 750 F.2d 122 (D.C. Cir.1984) 7, 9, 16

Sangabi v. INS, 763 F.2d 374 (9th Cir.1985) 13

Santana-Figueroa v. INS, 644 F.2d 1354 (9th Cir.1981) 9

Williams v. INS, 773 F.2d 8 (1st Cir.1985) 7, 10

Yahkpua v. INS, 770 F.2d 1317 (5th Cir.1986) .. 10

Zamora-Garcia v. INS, 737 F.2d 488 (5th Cir. 1984) 9

STATUTES AND REGULATIONS:

Administrative Procedure Act,

5 U.S.C. 706 7

Immigration and Nationality Act,

8 U.S.C. 1182 14

8 U.S.C. 1254 ..... 3, 12

8 U.S.C. 1255 ..... 3, 16

TABLE OF AUTHORITIES—Continued

Pages

Immigration Reform and Control Act of 1986, Pub. L. No. 99-603,

8 U.S.C. 1255a 14

8 U.S.C. 1255a(a)(1) 14

8 U.S.C. 1255a(a)(4) 14

8 U.S.C. 1255a(e) 14

Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639

Section 5 16

No. 86-1008

In The
Supreme Court of the United States
October Term, 1986

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

ALIAKBAR FAZELIHOKMABAD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT

Respondent is a native and citizen of Iran who last came to the United States as a student on January 26, 1977. He remained in status as a student until 1979 when he filed a late application for an extension of stay. He was ordered

deported on May 22, 1980 as an overstay. He appealed to the Board of Immigration Appeals (BIA), but his appeal was dismissed on March 17, 1981.

Respondent thereupon filed a petition for review in the Ninth Circuit Court of Appeals (No. 81-7236). The petition for review was dismissed on April 20, 1984 because the respondent's counsel had informed the court that he was unable to locate respondent (A.R. 137-138).[1]

On June 18, 1984, the Immigration and Naturalization Service (INS) issued a notice to respondent to surrender for deportation on July 11, 1984. This was the first time respondent learned that his petition for review had been dismissed.[2]

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[1] The government has maintained throughout these proceedings that respondent was negligent in pursuing this petition for review. Respondent claims that it was not his fault, but rather his attorney's, that the petition was dismissed. At the time of his deportation hearing, respondent was represented by Douglas P. Haffer and his associate, Wayne Caldwell. Mr. Caldwell represented respondent at his deportation hearing (A.R. 168), but Mr. Haffer filed the notice of appeal (A.R. 165) and prepared the brief on appeal (A.R. 159). While the petition for review was pending at the Ninth Circuit, Mr. Haffer quit his law practice and moved to Washington, D.C. He left all his cases with Wayne Caldwell (A.R. 37). In 1982, Mr. Haffer returned to San Francisco and resumed his law practice. He wrote to respondent at respondent's address, 55 Eastmoor Avenue #5, Daly City, CA 94105 (A.R. 57). Apparently, Mr. Haffer gave up his practice again sometime in 1983. On January 30, 1984, the Ninth Circuit requested respondent to file a status report stating, inter alia, respondent's current address. Mr. Caldwell reported to the court that he could not locate respondent, but his only effort consisted of writing to respondent at 2582-38th Avenue, San Francisco, California (A.R. 58), an address at which respondent last resided in August of 1980 (A.R. 34). Respondent's correct mailing address was the Eastmoor Avenue address (A.R. 34).

[2] The INS located respondent at the Eastmoor Avenue address (A.R. 61).

On July 9, 1984, respondent married Lauralee (Laurie) Eulalie Thoms,[3] an American citizen, whom he had met in August of 1983 and with whom he had been living since December 1983. Respondent did not report for deportation. On October 4, 1984, he and Laurie appeared at the Immigration Service to file her relative visa petition on his behalf and his application for permanent resident status. Respondent was taken into custody.[4]

Respondent thereupon submitted motions to reopen the deportation proceedings to apply for adjustment of status (8 U.S.C. § 1255) and suspension of deportation (8 U.S.C. § 1254). His adjustment of status application was submitted in conjunction with his wife's immediate relative visa petition on his behalf. In support of his motions, he submitted affidavits and other evidentiary material to demonstrate that his marriage was bona fide, that it was not his fault, but rather his attorney's, that his petition for review

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[3] Petitioner insists on spelling respondent's wife's name as "Thomas" when it is in fact "Thoms". (See Petition for Writ of Cert. at 3-5 for incorrect spelling and the copy of the birth certificate of Lauralee Eulalie Thoms at A.R. 134 for correct spelling.) In fact, petitioner corrects the Ninth Circuit's "misspelling" of the name (Pet. App. 2a). Respondent has maintained throughout these proceedings that the government has distorted the facts of his case. The misspelling of his wife's name is but one example.

[4] The District Director denied a stay of deportation request. Deportation was stayed when the Ninth Circuit reinstated the previously dismissed petition for review. The petition was reinstated after an oral emergency motion with the understanding that respondent was eligible for relief from deportation and would be filing a motion to reopen the proceedings to apply for such relief (Pet. App. 18a). Respondent was released from custody on October 10, 1984 after posting a $25,000 bond. The petition for review was dismissed, upon respondent's motion, on March 6, 1985 after the BIA denied the motion to reopen and the second petition for review was filed (Pet. App. 16a).

was dismissed and that he and his wife would suffer extreme hardship were he to be deported to Iran because of the current conditions in Iran and because it would be practically difficult for him to apply for an immigrant visa abroad (Pet. App. 2a).

The BIA denied respondent's motions on February 8, 1985. The BIA denied the motion to reopen for adjustment of status in the exercise of discretion, relying on three negative factors (as described by the BIA); 1) that respondent married barely two days before he was required to leave the country; 2) that he did not adequately explain his failure to surrender for deportation; and 3) that he was negligent in failing to prosecute his petition for review. The BIA recited the same negative factors in denying his motion to reopen to apply for suspension of deportation as a matter of discretion. In addition, the BIA found that respondent did not present a prima facie case of extreme hardship, because neither respondent nor his wife would suffer permanent hardship because respondent had the ready means to immigrate through his marriage (Pet. App. 4a).

The Court of Appeals reversed the BIA's decision and remanded for further consideration (Pet. App. 1a-7a). It relied on its own previous decisions which had held that in denying a motion to reopen, the BIA must weigh both favorable and unfavorable factors, must state its reasons when weighing equities and denying relief, and in weighing equities "cannot act upon assumptions unsupported in the record and contradicted by affidavits that are not inherently unbelievable" (Pet. App. 4a-5a). The court concluded that the BIA had acted arbitrarily and irrationally because each of the factors upon which the Board relied "were based upon mere assumptions which were contra-

dicted by the [respondent's] evidence" (Pet. App. 5a). Specifically, the court found that the BIA's conclusion that respondent had been negligent in not pursuing his previous petition for review was contradicted by respondent's own affidavit (Pet. App. 6a). The court found that it was an abuse of discretion for the BIA to ignore the evidence submitted concerning the bona fides of the marriage and instead rely on the last minute timing of the marriage to discount the marriage as a significant equity (Pet. App. 5a-6a). And, the court found that the BIA's assumption, in rejecting respondent's extreme hardship claim, that he could readily immigrate was not supported by evidence in the record indicating the difficulties he would encounter due to required military service and lack of an American Consulate in Iran (Pet. App. 6a-7a).

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SUMMARY OF ARGUMENT REASONS FOR DENYING CERTIORARI

A careful review of all relevant Court of Appeals decisions reveals that there is no conflict among the circuits concerning the proper standard to be applied in reviewing BIA discretionary denials of motions to reopen. Neither does the Ninth Circuit's approach to reviewing such BIA discretionary denials conflict with Supreme Court precedent.

The case is not a proper vehicle for Supreme Court consideration of the role of the Court of Appeals in reviewing BIA discretionary denials of motions to reopen because of intervening legislation which will affect future motions to reopen and which personally affects respondent's case.

The Immigration Reform and Control Act of 1986 (Pub. L. No. 99-603 (Nov. 6, 1986)) provides respondent a remedy from deportation which does not rely on the Board's discretion to reopen the proceedings in his case. By the time this case is briefed and argued, if accepted by the Court, respondent already will have filed his application for legalization and is likely to have already achieved his relief from deportation. The Immigration Marriage Fraud Amendments of 1986 (Pub. L. No. 99-639 (Nov. 10, 1986)) will virtually eliminate all motions to reopen for adjustment of status based on eligibility for permanent residence through marriage.

This case is not ripe for review because it has been remanded to the BIA. Moreover, it is not a proper vehicle for Supreme Court consideration because of the significant factual issues which still remain to be resolved on remand.

ARGUMENT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE PROPER STANDARD OF REVIEW TO BE APPLIED IN REVIEWING DISCRETIONARY DETERMINATIONS BY THE BIA. NOR DOES THE STANDARD USED BY THE NINTH CIRCUIT IN THIS CASE CONFLICT WITH SUPREME COURT PRECEDENT.

1. Conflict Among the Circuits

A denial by the BIA of a motion to reopen will be reviewed on a petition for review utilizing an abuse of discretion standard. *INS v. Rios-Pineda,* 471 U.S. 444 (1985),

INS v. Phinpathya, 464 U.S. 183 (1984). The circuit courts have adopted various language formulations in articulating the abuse of discretion standard. The two most prevalent formulations are taken from the Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law", and from *Wong Wing Hang v. INS,* 360 F.2d 715, 719 (2nd Cir. 1966), "a decision made without rational explanation, which inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination against a particular race or group". The circuit courts have never indicated any conflict between these two standards.[5] Several courts have utilized both standards in their decisions, in a complementary fashion. See, *e.g. Sang Seup Shin v. INS,* 750 F.2d 122, 124 (D.C. Cir. 1984) ("[A] tribunal may not act arbitrarily or irrationally. . . . It must explain departure from established policies".); *Balani v. INS,* 669 F.2d 1157, 1160-61 (6th Cir. 1982); *Williams v. INS,* 773 F.2d 8, 9 (1st Cir. 1985).

Petitioner contends that the Ninth Circuit applies a much more searching standard of review—that the Ninth Circuit reviews BIA decisions de novo, not for an abuse of discretion, and applies a strict articulation test (Pet. for Writ of Cert. 15). However, it is apparent from the decision in this case that the Ninth Circuit, like other circuits, will only reverse a discretionary determination if it is "arbitrary, irrational or contrary to law" (Pet. App. 4a). Why then does petitioner contend that the Ninth Circuit reviews

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[5] This Court found no conflict between these two standards in *Citizens to Preserve Overton Park, Inc., et al. v. Volpe, Secretary of Transportation, et al.,* 401 U.S. 402, 416 (1970).

decisions de novo and applies a strict articulation test? Petitioner bases his argument on those Ninth Circuit decisions which reviewed BIA decisions to determine whether they fairly considered the evidence and claims put forth by an alien from a *procedural* standpoint. Petitioner argues that these decisions conflict with decisions from other circuits, specifically the First, Second, Sixth and Seventh Circuits (Pet. for Writ of Cert. 16). But, a careful review of decisions from these circuits and others reveals that there is, in fact, no conflict among the circuits.

The Ninth Circuit requires that the BIA weigh both positive and negative factors when considering a motion to reopen, *De La Luz v. INS*, 713 F.2d 545, 546 (9th Cir. 1983) and requires that the BIA demonstrate in its decision that the equities have been weighed and state its reasons for denying relief. *Prapavat v. INS*, 662 F.2d 561, 562 (9th Cir. 1981). Further, the Ninth Circuit requires that the BIA consider all evidence submitted by an alien in support of a motion to reopen, *Mattis v. INS*, 774 F.2d 965, 968-69 (9th Cir. 1985), and must accept as true uncontradicted statements in affidavits unless inherently unbelievable, *Reyes v. INS*, 673 F.2d 1087, 1090 (9th Cir. 1982). Finally, the Ninth Circuit has found an abuse of discretion when the BIA acts upon assumptions not in the record and misapplies the principles upon which it purports to act. *Gonzalez-Batoon v. INS*, 791 F.2d 681, 686 (9th Cir. 1986) (en banc).[6]

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[6] For instance, in *Mattis v. INS*, 774 F.2d 965 (9th Cir. 1985), the court reversed and remanded where the BIA denied a motion to reopen because of the alien's last minute marriage despite the substantial evidence submitted demonstrating the bona fides of the marriage. In *Gonzalez-Batoon v. INS*, 791 F.2d 681 (9th Cir. 1986), the court found an abuse of discretion when the BIA "misstated the record and accused the [alien] of overstaying a grant of voluntary departure when in fact she had not done so" (Pet. App. 5a).

Other circuits' decisions are not in conflict with the Ninth Circuit's aproach. In fact, several circuits specifically have adopted the same approach and have cited the Ninth Circuit's decisions. The Eighth, Tenth and District of Columbia Circuits have held, relying on Ninth Circuit decisions such as *Prapavat, Reyes,* and *Santana-Figueroa v. INS,* 644 F.2d 1354 (9th Cir. 1981), that the BIA must consider all factors, articulate reasons for denial and accept statements in affidavits as true unless inherently unbelievable and that the BIA cannot deny motions to reopen for reasons contradicted by evidence in the record. *See, Carrete-Michel v. INS,* 749 F.2d 490 (8th Cir. 1984), *Motamedi v. INS,* 713 F.2d 575 (10th Cir. 1983), *Sang Seup Shin,* supra, and *Haftlang v. INS.* 790 F.2d 140 (D.C. Cir. 1986).

The Third and Fifth Circuits have developed a similar approach. In *Ravancho v. INS,* 658 F.2d 169 (3rd Cir. 1981), the Third Circuit found that the procedure utilized by the BIA in considering a motion to reopen may amount to an abuse of discretion. The court then concluded that there was an abuse of discretion when the record contained uncontradicted evidence of eligibility for deportation relief and the BIA gave no reasoned evaluation of its reasons for denial. Similarly, in *Zamora-Garcia v. INS,* 737 F.2d 488, 490 (5th Cir. 1984), the Fifth Circuit held that a reviewing court should properly review BIA "determinations 'procedurally' to ensure that the complaining alien has received full and fair consideration of all circumstances that give rise to his or her claims".[7] The court then re-

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[7] The court relied on the Ninth Circuit cases, *Prapavat v. INS,* 662 F.2d 561 (9th Cir. 1981) and *Santana-Figueroa v. INS,* 644 F.2d 1354 (9th Cir. 1981) and on *Ravancho v. INS,* 658 F.2d 169 (3rd Cir. 1981).

versed and remanded for the BIA to consider certain factors not considered in their original decision. See also, *Ramos v. INS,* 695 F.2d 181 (5th Cir. 1983).[8]

Decisions by the First, Sixth and Seventh Circuits do seem to indicate an approach differing from the Ninth Circuit's at first glance, but upon more careful consideration, the decisions reveal an approach which is not significantly in conflict with the other circuits. For instance, in *Williams v. INS,* supra, and *LeBlanc v. INS,* 715 F.2d 685 (1st Cir. 1983), the First Circuit found that its scope of review of BIA discretionary decisions was quite narrow, and it applied the standard taken from *Wong Wing Hang.* However, in each case, there were no factual disputes in the record, no indication that the BIA failed to consider relevant factors and the BIA's decision was grounded on clear negative factors of the type present in *Rios-Pineda,* (e.g. dilatory tactics and repeated immigration violations).[9] *See also, Balani v. INS,* 669 F.2d 1157 (6th Cir. 1982) (The aliens pre-

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[8] Other Fifth Circuit cases seem to differ in approach, finding that a court's review of BIA decisions is extremely limited and concluding that BIA decisions would be upheld even if the BIA did not indicate specifically that it had considered each and every factor. *See Osuchukwu v. INS,* 744 F.2d 1136 (5th Cir. 1984), *Luciano-Vincente v. INS,* 786 F.2d 706 (5th Cir. 1986) and *Yahkpua v. INS,* 770 F.2d 1317 (5th Cir. 1986). However, in none of these cases was there a dispute concerning the facts, and the court concluded in each case that the BIA decision adequately indicated that the BIA had fairly considered all factors, the alien's claims and the evidence submitted.

[9] In an earlier decision, *Luna v. INS,* 709 F.2d 126 (1st Cir. 1983), the First Circuit found that the BIA abused its discretion in relying on a negative fact which was in dispute. The court held, relying on the Ninth Circuit's *Reyes* decision, that a factual dispute should not be resolved against an alien in the motion to reopen context without a hearing.

sented neither a prima facie case of extreme hardship for suspension of deportation nor new material facts justifying reopening.) and *Dallo v. INS*, 765 F.2d 581 (6th Cir. 1986) (The alien presented no equities at all, had engaged in a fraudulent marriage and had pursued dilatory tactics.)

Petitioner places great reliance on *Achacoso-Sanchez v. INS*, 779 F.2d 1260 (7th Cir. 1985) (Pet. Writ for Cert. 16, 20), wherein the Seventh Circuit found that judicial review of BIA determinations was severely restrictive and applied the *Wong Wing Hang* standard. Nevertheless, the court acknowledged that the BIA does abuse its discretion when "it acts for a forbidden reason or for a reason that the court *can* determine is erroneous". *Achacoso-Sanchez v. INS*, 779 F.2d at 1265. Moreover, the court stated clearly that "the Board abuses its discretion when it acts on a supposition that is not true." *Id.* at 1266.[10] Therefore, it would appear that the Seventh Circuit would not differ in its approach from the Ninth Circuit if presented with a case where the BIA distorted the evidence, ignored important evidence or based its discretionary determinations on suppositions not supported by the record.

In sum, all circuits apply a similar standard to review discretionary determinations by the BIA, and every circuit,

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[10] The court was troubled by the BIA's assertion that the alien would only have a short separation from her family due to her eligibility for an immigrant visa; the court questioned whether that assertion was factually true. *Achacoso-Sanchez v. INS*, 779 F.2d 1260, 1266 (7th Cir. 1985). The court did not find an abuse of discretion because the alien did not submit any evidence that the BIA's supposition was in error, *Id.* at 1267, but presumably had the alien's evidence contradicted the BIA's suppositions, as in respondent's case, the court would have reversed.

which has considered a challenge to the fairness of the procedure whereby the BIA has evaluated the claims and evidence submitted on motions to reopen, has concluded, consistent with the Ninth Circuit's decisions, that the BIA must fairly consider all factors, articulate a basis for its denial and fairly treat the evidence submitted. There is no conflict among the circuits on this point.

2. Conflict With Supreme Court Precedent

The Ninth Circuit's decision in this case is in no way in conflict with this Court's decisions in *Jong Ha Wang,* 450 U.S. 139 (1981) or *INS v. Rios-Pineda,* supra. In *Wang,* this Court reversed a Ninth Circuit decision which had determined that the alien had presented a prima facie case of extreme hardship for suspension of deportation and therefore was entitled to have his case reopened. The Court reversed on the grounds that the alien had not complied with the regulatory requirement to submit affidavits or other evidentiary material and that the Ninth Circuit had impermissibily interfered with the BIA's broad discretion to construe the extreme hardship requirement contained in 8 U.S.C. § 1254.

In *Rios-Pineda,* this Court reversed an Eighth Circuit decision which had held that reopening for suspension relief was mandated when a prima facie case of extreme hardship had been demonstrated. This Court found that the BIA could deny a motion to reopen as a matter of discretion when it determined that the underlying relief, i.e. suspension of deportation, would be denied as a matter of discretion. The Court further concluded that the BIA's decision did not "involve the unreasoned or arbitrary exercise of discretion" and that "the BIA's explanation of its decision was grounded in legitimate concerns

about the administration of the immigration laws''. *Id.* at 451-52. In the particular case, the Court upheld the BIA's discretionary denial based on the aliens' use of dilatory tactics to gain the seven years residence required for suspension and on their repeated, flagrant violations of the immigration laws.

In neither *Rios-Pineda* nor *Wang* did this Court indicate that the BIA's broad discretion in evaluating motions to reopen extended to basing its decisions on evidence contradicted in the record or to making discretionary determinations without considering all of the evidence or all of the factors relevant to the alien's claim. Therefore, neither the Ninth Circuit's decision in this case nor in other cases cited by petitioner conflict with this Court's decisions in *Wang* and *Rios-Pineda.* Moreover, the Ninth Circuit has followed this Court's lead in *Rios-Pineda* in upholding discretionary denials where there has been flagrant violations of the immigration laws, *Ahwazi v. INS,* 751 F.2d 1120 (9th Cir. 1981) and *Sangabi v. INS,* 763 F.2d 374 (9th Cir. 1985), and in requiring that BIA discretionary determinations be grounded in legitimate concerns about the administration of the immigration laws, *Gonzalez-Batoon v. INS,* 791 F.2d at 686 and *Aviles-Torres v. INS,* 790 F.2d 1433, 1437 (9th Cir. 1986).

II. THIS CASE IS NOT A PROPER VEHICLE TO RAISE THE ISSUES PRESENTED BECAUSE OF INTERVENING LEGISLATIVE DEVELOPMENTS.

1. Immigration Reform and Control Act of 1986.

Since respondent's case was decided by the Ninth Circuit, he has become eligible for another form of relief from deportation, namely, legalization, under the Immigration

Reform and Control Act of 1986 (IRCA). Pursuant to Section 201 of IRCA, codified as 8 U.S.C. § 1255a, respondent is eligible to adjust his status to that of a temporary resident, and after eighteen months in that status, he will be eligible to apply for adjustment to lawful permanent resident status. He will be able to make his application for legalization when the application period begins in May, 1987. He is required to make his application during the first 30 days of the application period. 8 U.S.C. § 1255a(a)(1). Until such time as his application is filed and while his application is pending, he cannot be deported under a stay of deportation provided by IRCA, and once he files an application, he will be granted work authorization. 8 U.S.C. § 1255a(e).

The eligibility requirements—illegal residence in the U.S. since at least December 31, 1981, admissibility under 8 U.S.C. § 1182, no felony conviction or convictions for three misdemeanors and others listed in 8 U.S.C. § 1255a (a)(4)—can all be met by respondent as is evident from the record. Moreover, determinations made under this new law are not subject to INS discretion; nor is a motion to reopen required to allow consideration of the temporary residence application. Therefore, it is a foregone conclusion that by the time this Court considers this case, if accepted for consideration, respondent will have already filed his application for temporary residence, obtained work authorization and escaped deportation. Respondent will have essentially obtained the relief he sought through his motion to reopen—suspension of deportation and eligibility for permanent resident status. For the Court to decide the issues presented for review in the context of this case would be a hollow exercise for the eventual outcome

would have no effect on the ultimate disposition of respondent's case.

2. The Immigration Marriage Fraud Amendments of 1986

The Immigration Marriage Fraud Amendments of 1986 (Marriage Fraud Amendments) have drastically altered the procedures for applying for adjustment of status based on marriage in the context of deportation proceedings. Section 5 of the new law provides that an alien who marries while in deportation proceedings is barred from adjustment of status based on the marriage and requires that a relative visa petition on his/her behalf may not be approved until the alien has resided outside the United States for a period of two years after the date of the marriage. If this new law had been in effect when respondent married his wife, he would not have been eligible to file a motion to reopen for adjustment of status. Section 5 virtually eliminates all motions to reopen for adjustment of status based on marriage since motions to reopen must be based on new facts or evidence not available at the time of the original deportation hearing. Usually, when motions to reopen are filed for adjustment of status based on marriage, the new fact is the marriage itself. But, under the new law, if the alien marries after deportation proceedings have commenced, he will be ineligible for adjustment of status and must depart the United States for two years before immigrating.[11]

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[11] One discreet fact pattern which would allow motions to reopen for adjustment of status would be where the alien mar-

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Section 5 of the Marriage Fraud Amendments should also affect how the BIA looks at claims for suspension of deportation based on extreme hardship to a citizen spouse acquired during deportation proceedings. The forced separation of two years before reimmigration could be considered to indicate substantial hardship, in and of itself. In respondent's case for instance, the Ninth Circuit found that respondent's claim that he would be forced to return to Iran for at least two years was important to his claim that he and his wife would suffer extreme hardship (Pet. App. 6a-7a). On the other hand, the BIA might give less weight to such hardship because Congress has specifically indicated its suspicion of marriages entered into after deportation proceedings have commenced and to grant suspension would interfere with the deterrence goal of the adjustment prohibition.

Respondent's case directly involves how the BIA evaluates motions to reopen for adjustment of status based on marriage and claims for suspension of deportation based on hardship to a U.S. citizen spouse acquired during deportation proceedings. Since the rules of the game have completely changed since the BIA and Ninth Circuit de-

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ried a lawful permanent resident before deportation proceedings commenced and was ineligible to adjust at the hearing because of quota limitations or 8 U.S.C. § 1255 ineligibility (out of status, working without authorization). If subsequent to the hearing his wife becomes a United States citizen and he would become eligible for adjustment, he could file a motion to reopen for adjustment based on the new fact of his wife's citizenship. He would not be ineligible for adjustment under the new law because his marriage occurred prior to the initiation of deportation proceedings. *See Sang Seup Shin v. INS*, 750 F.2d 122 (D.C. Cir. 1984).

cisions, this case is not a proper vehicle to decide how the BIA should make discretionary determinations on motions to reopen. Discretionary determinations turn on the individual facts of each case. "Judicial discretion is governed by the situation and circumstances affecting each individual case." *NLRB v. Guernsey-Muskingum Electric Co-op, Inc.*, 285 F.2d 8, 11 (6th Cir. 1960), quoted in *Balani v. INS*, 669 F.2d at 1161. A decision made by this Court in this case would have little practical applicability to other subsequent cases because of the significant changes in the law. It would be better for this Court to wait and let the BIA and circuits have a chance to develop standards and approaches for evaluation of motions to reopen arising after the changes in the law.

III. THIS CASE IS NOT YET RIPE FOR REVIEW NOR IS IT A PROPER VEHICLE TO RAISE THE QUESTIONS PRESENTED BECAUSE OF THE FACTUAL DISPUTES LEFT UNRESOLVED.

The Court below ordered a remand to the BIA to allow the BIA to consider the evidence it failed to consider in making its original determination. The propriety of deferring review by this Court until after remand has been recognized by this Court. In *Brotherhood of Locomotive Firemen and Enginemen, et al. v. Bangor & Aroostoor Railroad Co., et al.*, 389 U.S. 327, 328 (1967), this Court determined that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court."

The question the petitioner presents for review—whether the BIA's discretionary decision to deny reopening must be affirmed if plausible and not arbitrary—cannot be addressed if the BIA's so-called plausible explana-

tion does not take into consideration all of the facts. That specific legal issue would be better addressed after the BIA had an opportunity to provide an explanation for its decision that took into consideration all of the available facts.

Further, this case involves a genuine dispute between the parties as to factual matters. The BIA never attempted to resolve the factual disputes—whether respondent was at fault for not pursuing his appeal and whether respondent could readily reimmigrate—because the BIA completely ignored the evidence presented and statements made by respondent. This Court's attention to this case at this point would be premature because there are important factual issues to be resolved by the BIA on remand.

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CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

TERRY J. HELBUSH
Attorney for Respondent

Dated: February 19, 1987

(3)

No. 86-1008

Supreme Court, U.S.
FILED
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ALIAKBAR FAZELIHOKMABAD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE IMMIGRATION AND NATURALIZATION SERVICE

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11pp

TABLE OF AUTHORITIES

Page

Cases:

Achacoso-Sanchez v. *INS*, 779 F.2d 1260 (7th Cir. 1985) . 3, 4
Balani v. *INS*, 669 F.2d 1157 (6th Cir. 1982) 4
Hernandez-Cordero v. *INS*, 783 F.2d 1266, reh'g en banc granted, 793 F.2d 701 (5th Cir. 1986) 3
INS v. *Bagamasbad*, 429 U.S. 24 (1976) 7
INS v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987) 4, 5
INS v. *Jong Ha Wang*, 450 U.S. 139 (1981) 1, 2, 7
INS v. *Rios-Pineda*, 471 U.S. 444 (1985) 1, 2, 7
Osuchukwu v. *INS*, 744 F.2d 1136 (5th Cir. 1984) 3, 4
Saldana v. *INS*:
762 F.2d 824 (1985), amended, 785 F.2d 650 (9th Cir. 1986) 2
793 F.2d 222 (9th Cir. 1986) 2
Williams v. *INS*, 773 F.2d 8 (1st Cir. 1985) 4
Yahkpua v. *INS*, 770 F.2d 1317 (5th Cir. 1985) 4

Statutes:

Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 *et seq.* 4
Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 *et seq.* 4
§ 5, 100 Stat. 3543 5
§ 5(c), 100 Stat. 3543 5

In the Supreme Court of the United States

OCTOBER TERM, 1986

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IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

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ALIAKBAR FAZELIHOKMABAD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE IMMIGRATION AND NATURALIZATION SERVICE

The court of appeals held that the Board of Immigration Appeals (BIA) improperly denied respondent's motion to reopen deportation proceedings. As we explained in our petition (at 12-15), the Ninth Circuit has repeatedly engaged in what amounts to *de novo* review of the BIA's discretionary rulings on motions to reopen. It has done so, we noted (Pet. 11-12, 15-16), contrary to the teachings of this Court (*e.g.*, *INS* v. *Rios-Pineda*, 471 U.S. 444 (1985); *INS* v. *Jong Ha Wang*, 450 U.S. 139 (1981)), and contrary to the more deferential approach of several other circuits that have addressed the question. The issue is important, we explained (Pet. 23-24), because the immigration authorities are forced to spend valuable time and resources conducting evidentiary hearings and other proceedings in numerous insubstantial cases.

1. Respondent's principal argument in opposing review (Br. in Opp. 6-13) is that the Ninth Circuit's decisions in this area are fully consistent with this Court's opinions and with those in every other circuit. That argument is without merit.

a. This Court has repeatedly made clear that the BIA has wide latitude in ruling on motions to reopen deportation proceedings. See, *e.g.*, *Rios-Pineda*, 471 U.S. at 449; *Jong Ha Wang*, 450 U.S. at 143-144 n.5. The Court has explicitly recognized (*Rios-Pineda*, 471 U.S. at 446; *Jong Ha Wang*, 450 U.S. at 140-141) that a motion to reopen is not provided for by statute but is purely a product of regulation to enable the BIA to reevaluate its prior disposition in light of significant new developments. And the Court (*id.* at 144 n.5) has emphasized the importance of permitting the BIA to be selective in deciding when to reopen a case.

As we explained (Pet. 8, 12-15), the Ninth Circuit, in this case and several others, has adopted standards of review that cannot be reconciled with this Court's decisions. Specifically, the Ninth Circuit essentially requires the BIA to discuss exhaustively each point raised by the alien in the motion to reopen. Failure to address a factor (or discussion of it in a summary manner) is a ground for reversal. Moreover, the Ninth Circuit frequently second-guesses the explanation actually given by the BIA, even when the BIA's reasons are entirely plausible and reasonable. As a result, it has reversed the BIA on a number of occasions for insignificant reasons. See Pet. 13-14 (discussing cases).

Although respondent asserts that the Ninth Circuit has been faithful to the decisions of this Court (Br. in Opp. 12-13), several judges *on that circuit* strongly believe otherwise. As we noted (Pet. 14-15), in a recent dissent from the denial of rehearing en banc in *Saldana* v. *INS*, 762 F.2d 824 (1985), amended, 785 F.2d 650 (9th Cir. 1986), Judge Sneed, writing for himself and six other judges (793 F.2d 222 (9th Cir. 1986)), discussed at length (*id.* at 224-225) how various panels have disregarded this

Court's teachings that Congress bestowed discretion on the Attorney General and his delegates, not on the judicial branch.

The present case exemplifies the Ninth Circuit's application of a virtually insuperable standard of review. Although respondent's case was in no way unusual or compelling, and although the BIA gave detailed reasons for denying reopening, the court has remanded the case for further proceedings. This result is plainly contrary to *Jong Ha Wang* and *Rios-Pineda.*

b. Respondent also errs in arguing (Br. in Opp. 6-12) that the Ninth Circuit's decisions do not conflict with decisions of other circuits. As we explained (Pet. 15-16), the law in the First, Second, Sixth, and Seventh Circuits is that the BIA, in making a discretionary determination, must be affirmed unless its decision was not rational, departed from prior policies without explanation, or rested on an impermissible basis, such as class-based discrimination. See, *e.g., Achacoso-Sanchez* v. *INS*, 779 F.2d 1260, 1265 (7th Cir. 1985) (citing authority). Under that standard, the BIA's reasons "need not be compelling, or even convincing, to be sufficient" (*id.* at 1266). In the Fifth Circuit, the BIA is under "no duty to write an exegesis on every contention." Rather, the BIA is required simply to "consider the issues raised, and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted." *Osuchukwu* v. *INS*, 744 F.2d 1136, 1142-1143 (5th Cir. 1984); but see *Hernandez-Cordero* v. *INS*, 783 F.2d 1266, 1269, reh'g en banc granted, 793 F.2d 701 (5th Cir. 1986). The formulation of these deferential review standards is not an artifice for engaging in the kind of strict scrutiny conducted by the Ninth Circuit. Rather, as the case law reveals, the standard of review in those other circuits, both as articulated and as applied, differs substantially from the standard applied in

the Ninth Circuit.[1] Those other circuits properly recognize that in a system of immigration quotas, "[l]iberal use of discretionary relief may reward those who violate the immigration laws at the expense of those who observe them" (*Achacoso-Sanchez*, 779 F.2d at 1263).

2. Petitioner also argues (Br. in Opp. 13-17) that the Court should deny review because of the recent enactment of two immigration statutes: the Immigration Reform and Control Act of 1986 (Reform Act), Pub. L. No. 99-603, 100 Stat. 3359 *et seq.*, and the Immigration Marriage Fraud Amendments of 1986 (Marriage Fraud Act), Pub. L. No. 99-639, 100 Stat. 3537 *et seq.* This claim likewise lacks merit.

With respect to the Reform Act, petitioner does not dispute our position (Pet. 17-19) that the legal issues remain important to the Immigration and Naturalization Service (INS), notwithstanding the new legislation. Cf. *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 5 n.3 (question of proper standard governing asylum

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[1] See, *e.g.*, *Achacoso-Sanchez* (upholding BIA's denial of motion to reopen to apply for adjustment of status where alien married one day before her deportation hearing and engaged in dilatory legal maneuvers); *Williams* v. *INS*, 773 F.2d 8 (1st Cir. 1985) (upholding BIA's denial of alien's motion to reopen to apply for adjustment of status because of the alien's abuses of the immigration laws, even though the alien claimed that her actions were the result of ignorance rather than deliberate disregard of the law); *Yahkpua* v. *INS*, 770 F.2d 1317, 1321 (5th Cir. 1985) (upholding BIA's denial of request to reopen despite BIA's failure to mention all of the alien's contentions); *Osuchukwu*, 744 F.2d at 1142 (upholding BIA's decision despite the court's view that if it were the factfinder, it would have reached a different result); *Balani* v. *INS*, 669 F.2d 1157 (6th Cir. 1982) (affirming BIA's denial of motion to reopen to apply for suspension of deportation even though the alien's wife, his U.S. citizen son, and all of his other close relatives lived here, and even though he had a profitable business here that provided the sole support for his family).

remains important notwithstanding the enactment of the Reform Act). Rather, his argument is that "it is a foregone conclusion that by the time this Court considers this case, if accepted for consideration, respondent will have already filed his application for temporary residence, obtained work authorization and escaped deportation" (Br. in Opp. 14). But as we explained (Pet. 17-19), obtaining lawful temporary status is only the first step of the process. Only after an 18-month waiting period may such an alien then obtain lawful permanent resident status. Moreover, as we pointed out (*id.* at 18-19 & n.18), it may be advantageous for respondent to pursue his motion to reopen, since legalization does not afford an alien all of the benefits available to someone who obtains permanent residence status in some other way. See *Cardoza-Fonseca*, slip op. 4-5 n.3. Significantly, respondent has not at this time attempted to withdraw his motion to reopen despite his alleged confidence that he will eventually obtain temporary (and later permanent) resident status under the Reform Act. In short, the enactment of the Reform Act provides no basis for this Court to deny review.

Respondent also claims (Br. in Opp. 15-17) that the case is unimportant in light of the Marriage Fraud Act. But that statute merely provides, in relevant part, that an alien cannot obtain adjustment of status based on an eleventh-hour marriage (§ 5, 100 Stat. 3543).[2] It will in no way affect the number of motions to reopen to apply for other forms of relief, such as suspension of deportation, asylum, or withholding of deportation.[3] Respondent

[2] That provision applies only to marriages entered into after the statute's effective date (November 10, 1986) (§ 5(c), 100 Stat. 3543), and therefore does not affect respondent's request for adjustment of status. And it obviously has no effect on his request for suspension of deportation.

[3] Indeed, respondent concedes (Br. in Opp. 15-16 n.11) that even certain motions to reopen to apply for adjustment of status based on marriage will be permissible notwithstanding the Marriage Fraud Act.

therefore errs in claiming (Br. in Opp. 17) that a decision by the Court in this case "would have little practical applicability to other subsequent cases." In short, the new statute governing marriage fraud does not undermine the importance of the issues in this case.[4]

3. Even though the procedural posture of this case is similar to that in *Rios-Pineda* and *Jong Ha Wang*, respondent argues (Br. in Opp. 17-18) that this case is not ripe for review because there has not yet been a remand to the BIA. That argument misperceives the whole basis of the INS's concern. The Ninth Circuit's decisions have required the immigration authorities to expend valuable time and resources conducting further proceedings on remand in cases like this one, in which the alien is plainly not deserving of discretionary relief. Moreover, contrary to respondent's assertion (Br. in Opp. 18), this is not a case involving factual disputes.[5] Rather, the BIA has carefully

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[4] As we noted, however (Pet. 22 n.19), the Marriage Fraud Act *is* significant in this case in that it confirms the correctness of the BIA's decision to give less weight to respondent's eleventh-hour marriage.

[5] Respondent (Br. in Opp. 3 n.3) states that the government has "distorted the facts" of the case "throughout these proceedings." He cites, as the sole example, the government's spelling of his wife's name as "Thomas" rather than "Thoms." We regret any error in this regard, but we note that the spelling "Thomas" appears in some of respondent's own papers. See R. 17 (supplemental memorandum in support of the motion to reopen, filed by respondent's present counsel); R. 42 (affidavit of "Lauralee Thomas Fazelihokmabad" in support of the motion to reopen) ("R." refers to the certified administrative record, a copy of which was lodged with the court of appeals).

The only other factual matter analyzed by respondent in his opposing brief is his claim that his prior attorney was solely responsible for his failure to prosecute his original appeal in the court of appeals (Br. in Opp. 2 n.1). But as we pointed out (Pet. 21), and as respondent does not dispute, no effort was made by respondent to keep in contact with his attorney so that he could keep abreast of developments in his case. Thus, even when the facts are viewed most favorably to respondent, he must bear the blame for not pursuing his appeal.

reviewed respondent's motion to reopen and supporting materials and has concluded that relief is inappropriate both on discretionary grounds and because no *prima facie* showing of hardship was made (Pet. App. 9a-15a).[6] A remand for further proceedings would serve no useful purpose.

4. Finally, it is significant that while respondent tries to defend the standard of review applied by the Ninth Circuit, he does not even attempt to respond to our explanation (Pet. 20-23) of why that court erred on the merits.[7] As we indicated, the BIA's decision was correctly reasoned and fully accurate. In *Jong Ha Wang*, the Court stated (450 U.S. at 145): "[N]othing in the allegations indicated that this is a particularly unusual case requiring the Board to reopen the deportation proceedings." That statement is even more true in the present case.

To summarize, the issues presented are important to the proper functioning of the INS and to the orderly process of administering a large volume of immigration claims. Review is necessary to correct the Ninth Circuit's erroneous course of decision and to reaffirm the BIA's right to be selective in granting motions to reopen deportation proceedings.

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[6] Since the BIA denied relief on discretionary grounds, it was not even required to address the question whether respondent established a *prima facie* case for relief. See *Rios-Pineda*, 471 U.S. at 449; *INS* v. *Bagamasbad*, 429 U.S. 24 (1976).

[7] For example, he does not answer our legal argument (Pet. 23), in response to the Ninth Circuit's concern that there is no American consulate in Iran, that he could apply for permission to "self deport" to a country other than Iran or that he could apply in Iran for a visa to a third country and obtain a visa to enter the United States upon arrival in that country. Nor does he try to defend the court's holding that his violations of the immigration laws should be excused because, while ignoring the advice of an attorney, he relied on the advice of his (nonlawyer) friends.

For the foregoing reasons and those given in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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